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SUPREME COURT

In the
Supreme Court of the United States

OCTOBER TERM, 1948

NO. 63.

KIMBALL LAUNDRY COMPANY, A Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF OF PETITIONER

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KIMBALL LAUNDRY COMPANY, A Corporation,
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BRIEF OF PETITIONER

To: The Honorable The Supreme Court of The United States:

The petitioner, Kimball Laundry Company, a corporation, of Omaha, Nebraska, was granted a hearing by this Court upon petition for certiorari, October 11, 1948. The writ was directed to the United States Court of Ap-

peals, Eighth Circuit. The decision of that court to be reviewed was rendered March 11, 1948, affirming a judgment of the United States District Court for the District of Nebraska given in a condemnation proceedings wherein the petitioner's laundry and dry cleaning plant consisting of real and personal property was totally taken for an Army military laundry, on November 21, 1942. The case was tried to a jury on March 4-20, 1946. On March 22, 1946, two days after the case was closed, the Army declared the property surplus and abandoned it to the petitioner. The government prevailed in limiting its liability to the 3.6 years of operation, measured by interest on its separately appraised value of land, building, and machinery, plus its estimate of what would be the costs to replace and restore broken parts of the building and machinery. The petitioner as owner and operator was denied all of the measures for compensable damage which it offered to prove, as hereinafter set forth and explained under the heading, "Statement of the Case and Proceedings Below."

Petitioner seeks reversal and trial in accordance with this Court's mandate based upon the applicable law presented in this review.

THE OPINION AND JUDGMENT IN THE COURTS BELOW

1. The opinion dated March 11, 1948, sought to be reversed is Kimball Laundry Company, a Corporation, appellant, versus United States of America, appellee, Civil No. 13494, found in Vol. IV of the certified record 166 F. 2d 856, May 10, 1948, Court of Appeals, Eighth Circuit.

2. The verdict of the jury and the judgment of the trial Court below are found in Vol. I, 95 and 101 to 107.

JURISDICTION

This Court has jurisdiction to review the decision questioned, under Section 240(a), Judicial Code (28 U. S. C. 347a).

The questions presented arose in condemnation proceedings instituted by the United States against the petitioner, wherein the federal courts have jurisdiction (40 U. S. C. 257).

THE STATUTES INVOLVED

The following statutes involved are copied in the appendix to this brief.

28 U. S. C. § 391 (Judicial Code, § 269).

50 U. S. C. § 171; 171a; 621; 632; 636, amending 721; 636a, further amendments; 721; 722 (providing methods to pay government upon return of property to owner; 775; 776).

40 U. S. C. § 257, 258, 258a. Fed. Rules 81a(7).

Fifth Amendment to Federal Constitution on "just compensation."

Constitution of Nebraska, Art. I, § 21 (Vol. II, Rev. Stat. Neb. 1943, on "just compensation." (Aplt's. br. below, App. 13).

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

Note: [The footnotes on the following pages direct attention to the points relied upon for reversal in the Court of Appeals. These points were discussed and argued as error in petitioner's brief in the Court of Appeals. By stipulation of counsel when the record on that appeal was prepared, the points were placed in the appellant's brief rather than in the record (Vol. I, 142). Thus the brief below becomes a part of the record for review herein to that extent to determine the fact that these points were presented, discussed and briefed below. These same points with same numbers are set forth herein. Infra, pp. 34-108.

These points relied upon for reversal were discussed and argued in petitioner's brief (Aplt's. br. below, 14-88), followed by the supporting propositions of law (Aplt's. br. below, 89-126). Thus the necessity of reference herein to appellant's brief below because the court below said in reference to the presentation of the points, "most of them are not argued in the brief," and that "errors assigned, but not argued in the brief are waived." (Vol. IV, 6). Infra, pp. 34-108.

The court below made no statement of which points it deemed were or were not argued. Petitioner contends all were sufficiently argued to fully apprise the court of the errors. The points relied upon are set forth herein infra, pp. 34-108, and may be referred to herein the same as found in "Aplt's. br. below."]

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1. The petitioner, Kimball Laundry Company, is a Nebraska corporation. It owned the fee title, free from

liens, to all its real estate. Its personal property was free from liens or claims. It was using all its facilities, as a going concern, to operate an exceptionally large laundry and dry cleaning establishment in Omaha, Nebraska. It was neither the lessee nor lessor of any of the property involved. It had the "temporary use" of none of its real or personal property for any purpose.[1] It was doing a gross annual business of $400,000. It served a large part of the population of 250,000 of the city. This was the condition on Saturday, November 21, 1942, the day on which the petition in condemnation was filed in the United States Court.[2] The Army Quartermaster Corps took complete possession the following day of all appellant's plant with all its facilities, machinery, and equipment. The petitioner was, by force of the taking, put out of business.[3] The Army continued without interruption the operation of this plant as a laundry and dry cleaning establishment, retaining 180 employees and the managerial staff. Soon prisoners of war (100) replaced the skilled employees.[4] The Army operated the plant to service, for pay, the laundry and dry cleaning requirements of the soldiers, officers, and all the Army hospitals, training centers, and forts in the Seventh Service Command, all from this property taken by condemnation.[4.1]

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1. Complete word picture of plant, Vol. II, 273-285. Previous 5 years audits to show value, Vol. II, 290 (also to 221) rejected by the court.
2. Pet., Vol. I, 1 to 5. Condemns "right to use and occupy" p. 2. Also right to use and occupy—"all personal property—used in connection with said laundry." Order of taking recited—"prior to taking over business of said property." Vol. I, 11; and taken for—"the establishment of a military laundry located in the city of Omaha—," Vol. I, 17.
3. The trial court rejected the evidence of the president of the company that it was completely driven out of business as immaterial: Vol. II, 437-9. Error discussed Aplt's. br. below, XIX, 61. Infra herein 34-108.
4. Vol. II, 266, 270. Prisoners of war (100) by replacing skilled employees added to the destruction of the machinery and equipment.
4.1 Vol. II, 447-8. Court refused to permit arguing soldiers personally paid the army for their laundry services. Vol. II, 448.

2. The Army was admittedly in the continuous, uninterrupted possession and operation of the property to the exclusion of the petitioner from the time of the taking to the day it was declared surplus and abandoned to the petitioner, in its unrestored condition two days after the jury's verdict on March 20, 1946, at which time the property was by the army "found and declared to be surplus as of March 23, 1946."[4] It was abandoned to the petitioner without repairs, replacements or any attempt by the army to redeliver what had been condemned. Just compensation measured in money is now involved.

3. When taken, the company was doing an annual gross business as above stated of approximately $400,000.00. Financial statements showed a continual growth in volume and income since 1933.[5] It was one of the most efficient and expensively equipped laundries west of Chicago.[6] Its building was built of steel and concrete, five stories, 132 feet square. Its business was obviously that of a servicing corporation for those it agreed to service. It sold no merchandise; it manufactured none. Its value for condemnation or sale purpose depended upon the extent of the services performed and the profits on that work by this company. Its gross income since 1924 was

4. Vol. I, 97.

5. All the certified public accountants' evidence and exhibits were rejected save one column showing volume that was of no value without the complete audit. In a servicing company such as this petitioner, the business results are necessary to arrive at value besides the "brick and mortar." Vol. II, Ex. 1, 190; Ex. 2, 199; Ex. 3, 200; Ex. 4, 204; Ex. 5, 206; Ex. 6, 214-18; Ex. 7, 221.

Error in rejections, Aplt's. br. below, VII, 28-33, where each exhibit is discussed fully, with trial court's ruling by page reference to record, where not accepted. In the Propositions of Law these exhibits and testimony are further discussed, Aplt's. br. below, 95, 119; as to $400,000 business, Vol. II, 199-200.

6. Vol. II, 396-401.

$6,728,454.64.[7] The audits showed what part of this income was expended ($273,654.83 over last 6 years) to build and develop as assets what is known to the trade as trade routes.[7] The cost of the machinery and equipment at the time of the taking in 1942 was $405,294.81.[7] Its appraised value at that time was $273,831.39,[8] and the same men in 1945 shortly before abandoned, appraised it at $120,699.75. The cost of the building at the time of the taking was $205,035.12. The reproduction value of the building on November 21, 1942, was $280,348.00.[9] The power equipment was valued when taken at $62,928.08.[10] The land upon which the building and equipment stood was valued at $30,000.00. Its location was in downtown Omaha. The following is an itemization of the values comprising the plant without good will or capitalization of future earnings or prospective profit on November 21, 1942:

Building	$280,348.00
Machinery and equipment	273,831.39
Power equipment and incidental installations	62,928.08
Land	30,000.00
Customers' routes	340,516.85
Total	$987,624.32

(Rejected as immaterial by trial Court.)[11]

7. C. P. A. Hilmer's testimony on Exhibits, Vol. II, 190-221, rejected. (cf. footnote 5 above.) Vol. II, 244.

8. Vol. II, 245-262, Ex. 21-3, 260. Shows value of machinery and equipment in 1942, and by same witnesses in 1945 before the trial. Difference in value—$153,831.54. This evidence was taken from jury by Court's instructions. Error discussed Aplt's. br., below, 30, IX, argued under Propositions of Law, 113. It will be seen by the references that such measure of damages was denied consideration by the jury. Vol. I, 152-165.

9. Vol. II, Ex. 19, 264.

10. Vol. II, Ex. 23, 272-3. This before and after valuation of power equipment was denied consideration by the jury in the trial court's Instructions Argued Aplt's. br. below, 15-21. Instructions requested but not given, 21-26. Interest on "brick and mortar" values alone were permitted for the jury's consideration. Argued under Prop. Law I and II, Aplt's. br. below, 89 and 109.

4. To permanently establish itself by the expense of building up trade routes, men had been employed to interview various families and commercial houses throughout the City of Omaha for the solicitation of their laundry and dry cleaning requirements. These men during the previous six years built up for petitioner 15,093 regular trade route customers, all of which were being serviced on November 21, 1942. Under the price and accommodation terms of the contracts made by the petitioner, the articles for laundry and dry cleaning service were picked up without further contract and when serviced were returned without further contracts between such persons and the company. To further illustrate actual values in the condemned property, there were 1500 desk customers who were thus personally serviced across the counter. There were 4648 special customers who required special services at times throughout the year. There were 20,802 customers who from time to time sent in table linen, spreads, rugs, comforts, blankets, and lace curtains. These persons aggregated 42,043, called by the trade "trade route customers." There were no duplications in the figure. The petitioner paid to these route men to build and keep these routes during the said 6 years previous to the taking, $237,654.83, in salaries and commissions.[12] This sum was the principal but not the only item of expense to keep and maintain the routes against the competition from other laundries who likewise had route men at work

11. Aplt's. br. below, XIII, 44-48, Vol. II, 273-9; trial court's ruling, Vol. II, 315. All rejected by Court except land, building and machinery as basis for interest on each value as the only measure of damages permitted by Instructions, Vol. I, 150-165; Exceptions 165, 167; Appellant's Instructions requested but refused, 172-178. Assigned and discussed, Aplt's. br. below, 15-26. Argued, Prop. Law I and II, 89, 109.

12. Vol. II, 244; 234 shows itemization of gross income past five years. $400,000 for 1942. McDougal, Vol. II, 244, Ex. 13 refused. Error VIII, 33-38, Aplt's. br. below, argued, Prop. Law II, 109.

on guaranteed salaries and commissions. These routes (similar to a newspaper's circulation) had a market value in the trade as an inherent part of the concern, of $340,516.85 when the plant was taken. These were valued by trade practices as follows: $20 for each of 15,093 trade route customers; 50c for each of 4648 pillow customers; 50c for each of 6810 table linen customers; 50c for each of 5814 rug and blanket customers; 50c for each of 8178 lace curtain customers; $10 for each of 1500 call customers; and for 44 commercial customers which produced $34,253.13 revenue for 47 weeks during 1942, such as hotels, railroads, clubs, etc., evaluated in the trade at $728.79 per week at 15 times the weekly amount, thus proving the sum total of $340,516.85 as the value of the trade routes at the time of the taking.[13] These routes were totally destroyed by the taking and the retention of the property by the Army for three years, seven months, and eight days.[14] The army rejected all customers except soldiers and officers and the army hospitals, forts, etc., in the Seventh Corp Area. The part of the population serviced by the petitioner went immediately to other competing laundries as the obvious result of the taking. No money was paid at the taking and no opportunity whatever afforded appellant to continue elsewhere. Obviously this was the result of the necessity for immediate taking—to be later compensated in money.

5. The Certified Public Accountant's reports proved that no sums were carried for good will, trade name, advertising, or anticipated profits, future business or esti-

13. The witness Judd qualified as an expert to give these trade route values as a matter of trade practice. The trial court denied all consideration of them either as separate items or as a part of the composite value in 1942, or for any other purpose whatsoever. Vol. II, 367; Ex. 14, Vol. II, 370-1.

14. Vol. II, 437-9. Error predicated on rejection argued 89 Aplt's. br. below, 61, XIX; Vol. II, 237, explanation of Ex. 11.

mates of the value of the business. Only the realty and personalty valued as tangible assets were shown of record. Obviously these audits contained no evaluation of the trade routes[15] as good will. (Table, supra, page 7.)

6. By expert testimony based upon the actual experiences and fully itemized in exhibit form, the cost to build up again in the City of Omaha these trade routes; was offered in evidence. During the first year the gross income would be $100,000, while the total expense for that period would be $251,680.00, which, after figuring income, would show a net operating loss at the end of the first year of $151,680.00. For the second year the gross income would be $150,000.00 with an expense of $280,366.80, or an operating loss the second year of $130,366.80. For the third year there would be a gross income of $200,000.00 with an expense item of $330,483.20, and an operating loss of $130,483.20. In the fourth year the company should be able, then, to operate without further losses and build up its previous profitable income. But for the three years the net cost to re-establish its laundry and dry cleaning routes with the plant and facilities to be maintained and operated while so doing would be $411,450.00,[16] or a net loss of that sum of money.

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15. Vol. II, 200 C. P. A. Hillmer stating, "These items which were a factor in getting the increased business have been charged to expense and have not been capitalized as good will."

16. Vol. II, 372, 376, 380. All this evidence was rejected, with the trade route values, as not within the issues. Nevertheless in the opinion of the Court of Appeals the statement is made wholly without foundation and contrary to the above offered proof at Vol. IV, 8. "No doubt the government's occupation of the plant disrupted and damaged the company's business, although it could hardly have destroyed the demand for laundry service in the City of Omaha or disabled the company from ever re-establishing its business." This important part of the opinion erroneously infers that the evidence of cost to rebuild the routes, and the time it would take, and their value, when destroyed by the taking, were absent from the recorded testimony. The evidence was offered and rejected. Vol. II, 367, 370, 437-9. If the topic was important enough for the Court of Appeals to rule upon, it should have done so based upon the competent evidence offered in the record as above indexed. Aplt's. br. below, 53, Error XVI and discussion.

7. The building previously valued at $280,348.00 and the land at $30,000.00 were declared surplus after 3.6 years and abandoned to the petitioner. The power equipment and incidental installations were rendered useless or destroyed to such an extent that by orders of the Army commanding officers the plant was declared a danger to human life because of the unsafe condition of the boilers except for limited use at the time of surrender.[17] This near useless condition was occasioned by the necessary overloading and long hours of hard use. The power equipment was valued at $62,928.08 at the time of the taking and $35,260.53 at the time of trial, or a loss of $27,667.55 on such items.[18]

8. The building had considerable structural damage resulting from the overloading of boilers, causing shaking, and also from the rough usage in the rush to turn out the vast amount of work necessarily required by the army in the prosecution of the war. The very best of expert testimony of petitioner's witnesses gave detailed estimates of cost of the repairs to the building to place it in the condition that it was at the time of the taking at $53,970.00,[19] thus reducing the value of the building from $280,348.00 to $226,378.00, exclusive of painting or repairs to plumbing, heating, boilers, power plant, etc. The painting necessary after the 3.6 years was estimated at $17,281.00[20] by the best of expert painting contractors, thus reducing

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17. Vol. II, 310-11; Ex. 22-A, warning by command Major General Craig. Vol. II, 297-8. This offer to prove the laundry could not be operated at all in its condition invoked this trial Court's remark, "I can go down and operate one by myself, and I don't know anything about a laundry." This remark was obviously highly prejudicial and contrary to all the evidence. Error discussed Aplt's. br. below, XII, 13. Prop. of Law III.

18. Vol. II, 253.

19. Peter Kiewit, Vol. III, 831; Ex. 53, 835. Rejected.

20. Vol. III, 823; Ex. 52, 829 (Steinheimer). Rejected.

again the valuation of the building by such amount at the time of its abandonment. This evidence was rejected as indexed in footnotes.

9. Thus it might have been argued to the jury from this evidence, had it been received, that the building was valued, when returned, at $280,348.00 less $53,970.00 and $17,281.00, or reduced to $209,097.00; the machinery and equipment at $120,699.75;[20.1] the power equipment and incidental installations, $35,260.53; the land remaining at the same value of $30,000.00; and the trade routes were totally destroyed by the taking. These items aggregate $395,057.28. The difference in the valuation of the property of $987,624.32 when taken, and $395,057.28 in value when returned, has resulted in a loss of $592,567.04, to petitioner on the basis of the before and after values. The following tables illustrate the difference:

Date of taking Nov. 21, 1942.		Mar. 23, 1946 Date of return.
Land	$ 30,000.00	$ 30,000.00
Building	280,348.00	209,097.00
Power equipment	62,928.08	35,260.53
Mach., equip.	273,831.39	120,699.75
Route values	340,516.85	none
	987,624.32	395,057.28
Petitioner's Loss on before and after value		$592,567.04
Verdict under the court's instructions		297,776.03
Additional compensation denied completely by the court[20.2]		$294,791.01

20.1 Vol. II, 245, 262; Ex. 21-3, 260. Rejected by Instructions, Vol. I, 157-162. Assigned as error and discussed Aplt's. br. below, 82, 83, 87; also 39; Prop. of Law, I and II, 89, 109.

20.2 Vol. I, 155-162. Requested Instructions Refused, Vol. I, 172; Exceptions, Vol. I, 165.

10. The capital stock was owned by Harry A. Jacobberger, his brother, A. L. Jacobberger, and a son of Harry, Frederick, and their families. Each had spent his life in the laundry business. Frederick became a major in the United States Army in charge of the government laundry at Camp Carson, Colorado, and qualified as an expert with unusual experience. A. L. Jaccoberger, its general manager for years, offered to prove that the laundry had a fair, reasonable, market value as a going concern on November 21, 1942, of $987.624.32. This was rejected.[20.3] For the purpose of verification and explanation of the composite value, exclusive of any value for good will or trade name, he offered to prove and corroborate the evidence of the other witnesses shown in the table supra, page 6.

11. The jury's verdict[21] for the "use value" was $252,000.00, which is exclusive of the $45,776.03 returned under the instructions of the court[21.1] on the estimate of the damage to physical property suffered by the petitioner making the general judgment of $297,776.03.

12. Assuming that all other losses were included in the difference in the values of the property in 1942 and 1946 as $592,567.04, it is apparent from the evidence that should have been submitted to the jury, under proper instructions, that the verdict might readily have resulted in the sum of $592,567.04 rather than the verdict of $297,776.03 which was based on the evidence as limited by the trial court, the denial of requested instructions, and the exceptions to the ruling.[21.1]

20.3 Vol. II, 312-316.
21 Vol. I, 95; 101.
21.1 Vol. I, 155-162; 172; 165.

13. The court, by ruling out all the evidence as to the value of the plant as a going concern on November 21, 1942, either for the purpose of showing the basis for determining use or for the purpose of showing before and after value to determine proper pay for use,[22] denied petitioner substantial rights.

14. If the government's witnesses were permitted to testify that the proper measure of damages was the isolated value of the building, the isolated value of the machinery and the land, and to figure a percentage of interest thereon as the government's theory, and accepted by the court, then most certainly the court should have permitted the petitioner's offsetting evidence of what it considered the fair, reasonable "rental" value of the property when offered by the petitioner. This was denied directly or nullified by the court's instructions. The court for all intents and purposes instructed the jury to disregard everything that the owners had stated as to values for temporary use and left for the jury only the testimony of the government's inexperienced witnesses.[22.1]

15. At the very outset of the trial the court struck the answer of the petitioner.[22.2] The court refused the applications previously made for a pretrial hearing and failed to enter any order or direction as to the method or manner of proof for the measure of damages,[22.3] but the court stated, "in a sense we are plowing new ground, trying to arrive at a reasonable basis to afford the * * * owners just compensation under the Constitution."[22.4] Con-

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22. Vol. II, 315-6; Error Aplt's. br. below, XIII, 44-6. Argued under Prop. Law I, Aplt's. br. below, 89, 92, 103, 108-9; Vol. I, 155.
22.1 Vol. I, 157-162.
22.2 Vol. II, 183; Vol. III, 863.
22.3 Infra pp. 45-6.
22.4 Vol. II, 262-3.

sequently, the petitioner, opening the trial, took the position that the fair, reasonable market value of the property at the time of taking would be proper for all purposes during the trial. This position the court denied, and either refused to hear or ruled out on instructions to the jury evidence of the fair, reasonable market value when taken, for all purposes, as hereinabove clearly set forth and indexed in the footnotes, supra, p. 7.

16. However, the petitioner sought to show the fair, reasonable compensation for the use of the premises during the period because the court repeatedly so ruled must be the sole measure of damages. These "use" sums given by Harry A. Jacobberger, A. L. Jacobberger, and Fred Jacobberger were $600,000, $570,000, and $570,000 respectively.[23-1-2-3-4-5] Those figures included all items of com-

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23. A. L. J., Vol. II, 318-367; After 50 pages of examination to substantiate $570,000 as just compensation for the use, including all damages except to trade routes and business, the court said it would withhold ruling. Vol. II, 331—"We will take your motion (to strike the testimony of the owner) under advisement." Further at the close of the testimony, Vol. II, 367—"I will instruct the jury with reference to these items when the time comes." Later the court's instructions nullified the evidence, Vol. I, 155-165. Aplt's. br. below, Error XIV, 48 discussed. Instructions, Aplt's. br. below, 15-26. Argued, Prop. Law II, 111. Aplt's. br. below, Vol. I, 172-8.

23.1 Harry. J., Vol. II, 421-3; 441-3. The court assumed without cause the witness's estimate of $600,000 for the term included damages for trade route destruction, good will, and loss of business. So under such erroneous impression the testimony was nullified. Vol. II, 421-443. Error assigned. Aplt's. br. below, XVII, 54; argued under Prop. Law II.

23.2 Fred J.—unusual qualifications as Army Major in charge of Army laundry at Camp Carson, Colorado, and Jefferson Barracks, Mo., Vol. II, 443-58. His testimony re use compensation, $570,000 for 3.6 years, Vol. II, 454-5, excluded "loss of customers, routes, loss of business, or good will." Vol. II, 458-9. Ruling of court on objection was, Vol. II, 460, "I will instruct the jury on these items when the proper time comes." Inst., Vol. I, 157-162 and Inst. denied, Vol. I, 172-8.

23.3 Aplt's. br. below, Error XX, 63. Instruction of court specifically renouncing the witness, Fred J., Vol. I, 157; renouncing A. L. J. testimony, Vol. I, 156; renouncing Harry J. testimony, Vol. I, 156. Errors, Aplt's. br. below, XVIII, 56; XIV, 48. Briefed and argued Prop. Law I, 89; II, 110. If the itemization of what the owners had in mind to base their "use" compensation contained items not compensable as the trial court viewed them, the specific items should have been ruled out rather than the denunciation of the court finally saying, after the above comments (Vol. I, 157), "With these considerations in mind, how are we going to find the

pensation except damage to trade routes, business and good-will. Nevertheless the evidence was excluded by definite instructions of the court.[23.5]

17. In each instance, as shown in footnote 23, 23.1, 23.2, 23.3, 23.4, 23.5, the court either ruled out the testimony or by specific reference to each of the three owner-witnesses renounced their testimony so completely that the jury were left with no practical solution but to find as desired by the government witnesses.

18. There were three principal government witnesses:

(a) C. R. Crowder, who never used, bought, or sold laundry machinery and equipment, nor was he familiar with such property or the plant in 1942.[24] He was one of the assistants in the office of the Army Engineers. He went about the city to pick up information here and there about cost of repairs and replacements of such machinery and equipment. He was not a contractor or builder's architect. He was permitted over objections to testify, and compiled his own hearsay exhibits, 594 of them, over ob-

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fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. * * *" Next the court said in his instructions, Vol. I, 159, "Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate." Aplt's. br. below, Errors I-H, 18 and I-J, 19. Also errors on refusal of instructions; Aplt's. br. below, Error III, 21-5.

23.4 The court, by giving the instructions IV-b requested by the government, committed reversible error in a condemnation suit, because the jury were told to disregard evidence that did not appear anywhere as evidence during the trial. Error, Aplt's. br. below, 25-6; Vol. I, 164. These were: "interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily * * *." Argued and briefed, Prop. Law III. Aplt's. br. below, 124, stating: "The conduct of the trial must be proper, or reversible error results." Citing 144 Neb. 325, 329-333, 13 N. W. 2d 168. Court of Appeals rule limiting pages to 85 stopped further discussion, but the error is obvious and elementary.

23.5 Vol. I, 157-162.

24. Vol. III, 656.

jection,[25] which were received as "official government documents," and so volunteered by the trial court to the jury[26] to appellant's prejudice. Mr. Crowder stated that the cost to restore the entire building, painting, and all else would be $37,521.34; that it would cost $20,471.27 to restore the machinery where it was in 1942, less ordinary depreciation, including excessive use; and $1,750.40 for other items of replacement. His estimates total $59,743.01. No other figures were offered by either side that were less than this amount for the restoration of the building and the equipment, power plant, etc. Nevertheless, without evidence from any source, the jury found that this total damage was $45,776.03. ("Rental" $252,000; all damages, $45,776.03; total judgment based on jury's verdict, $297,776.03.)[27]

(b) Witness Weber who never ran a laundry, who never bought or sold laundry machinery or equipment, and was not a laundryman, stated as a professional appraiser[28] for the government that the total rental for the 3.6 years should be $70,000 per year, or a total of $252,000. That was exactly the sum the jury found. Under the form of the Exhibit 22[28.1] and the court's instruction[28.2] that interest on the separate sums would produce a proper result, no other conclusion was left for the jury.

(c) Lewis D. Sholes, for the government, a real estate man who never bought or sold any laundry machin-

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25. Vol. III, 634-5, Ex. 17.
26. Vol. III, 648; 692; 641, Ex. 18; 654.
27. Vol. I, 95-6.
28. Vol. III, 735-7; 723; 725; 728-9; 735-7; 744; 747; 749; Ex. 23, 750; Ex. 22, 735.
28.1 Vol. III, Ex. 22.
28.2 Vol. I, 159.

ery or equipment, never operated a laundry, was permitted to testify that the annual rental, including excessive use, should be $65,663.00 per year, plus additional costs of restoration above normal depreciation of $16,680.00. Mr. Sholes' total of all compensation was for the period $253,066.80.[29]

19. In the opinion of the Court of Appeals[30] the court said, "The jury's verdict was well within the evidence. While the total award was much less than the amount claimed by the company, it is exceeded by about $40,000.00, the highest estimate made by any government expert witness."

20. This will be seen from the record was not the fact. While the trial court is the judge of the credibility of witness and the admission of evidence, nevertheless these abuses of discretion are so numerous as to sum up to an unfair trial generally. The Court of Appeals should have so found.

21. It will be seen by a careful analysis of the exhibits above referred to and which were received in evidence over objection, that the jury's verdict was less than the estimate for restoration made by Mr. Crowder ($59,543.01) by approximately $15,000.00. The verdict for the "rental" was that fixed by the witness Weber ($252,000.00) and was almost identical with the total sum for all purposes fixed by the witness Sholes for the government.

22. Under the instructions of the court for all practical purposes the jury was denied the right to consider any evidence of the petitioner's witnesses generally, and

29. Vol. III, 775-8; Ex. 24, 776-9-80-3-4.
30. Vol. IV, 14.

therefore these government witnesses' figures were forced upon the jury by the court.[31]

23. Error has thus been committed, and substantial justice has been denied as hereinabove shown by proper reference to the record.[32]

24. All the foregoing were set up as points relied upon for reversal and each was specifically argued and discussed in appellant's briefs before the Court of Appeals, Eighth Circuit.[32] By stipulation of counsel the points relied upon for reversal below were presented in the brief below instead of in the record.[33] Each error was discussed and argued under the propositions of law applicable in appellant's brief below.[32]

A summary of the evidence on the estimated cost to restore and replace property destroyed discloses the following:

Admitted by Court Govt. witness Crowder's estimates for restoration of damages to structures.		Appellant's witnesses rejected except Dahlquist.		
Bldg. & Painting	$37,521.34	Bldg. (Kiewit)	$53,970.00	Rejected
		Painting (Steinheimer)	17,281.00	Rejected
Machinery	20,471.27	Boilers (Hanighen)	21,678.00	Rejected
		Boilers	6,183.00	Rejected
Replacements	1,750.40	Mach. & Equip. repairs (Dahlquist)	34,309.42	Received
(Received)	$59,743.01		$133,421.42	Rejected

(See footnotes p. 10 supra.)

31. Vol. I, 157-162.

32. Aplt's. br. below left with Clerk of U. S. Sup. Ct. for proof of proper discussion of points to the Court of Appeals.

33. Vol. I, 142.

25. The Jury's verdict for estimated restoration damages was $45,776.03.[34] The petitioner, of course, could not argue to the jury any item to contradict Crowder except Dahlquist's $34,309.42 by virtue of the rejecting of these exhibits and testimony by the court as above shown and all carefully indexed to the record in the foregoing footnotes.

26. Title 40 U. S. C. §257-8 (a) (appendix Aplt's. br. herein) specifically provides that in questions of procedure the state practice shall be followed. No substantial right would have been denied the government by the admission of the testimony of the witnesses Kiewit, Steinheimer, and Hanighen in rebuttal to Mr. Crowder's. These witnesses for petitioner are reputable men in their respective lines of business. They wholly discredited witness Crowder's statements. The trial Court ordinarily is the last word in such matters but that court shall not abuse its discretion when grave injustice obviously will result.[35]

27. Written pleadings are required under the Nebraska practice.[36] The court struck all of petitioner's answer.[37]

The trial Court reversed itself by first stating this very rebuttal evidence would be allowed because as the trial proceeded, petitioner offered evidence of before and after values, offered evidence of total values at time of taking for purposes of use value; then to meet the court's theory offered evidence of use value all as above

34. Vol. I, 95; 101-7.
35. Vol. III, 823; 828-9; 831-8; 847.
36. Appx. p. 21 this brief.
37. Vol. II, 183.

related. This evidence was all either denied at the time of offer or substantially ruled out by the court's instructions, as above shown in the footnotes. Consequently, when the anticipated restoration costs of $133,421.42 were offered in rebuttal to meet the Crowder testimony of $59,743.01, and was rejected, this further grave error by the trial Court occurred. It was not merely procedural irregularity (56 Neb. 600, 77 N. W. 120). Under 28 U. S. C. § 391, Jud. Code § 269, as interpreted, the ruling out of any competent testimony affecting substantial rights of one party gives grounds for examining the entire record and granting retrial to insure that justice will be done.[38]

28. The following table may be used to illustrate the manner in which petitioner was denied interest from the date of taking in violation of 40 U. S. C. 258a:

Date of Order of Taking	To What Date	Dates of Deposit	Amount	Date Withdrawn
Nov. 21, 1942 (I, 2)	June 30, 1943	June 21, '43	$30,140	Feb. 1, 1944 (I, 53)
May 11, 1943	June 30, 1944	Apr. 6, '44	50,000	Apr. 13, 1944 (I, 59)
Aug. 12, 1944	June 30, 1945	Aug. 10, '44	50,000 (I, 68)	Aug. 18, 1944 (I, 72)
May 28, 1945	June 30, 1946	Aug. 8, '45	65,000	Aug. 11, 1945 (I, 89)
Judgment $297,776.03 April 9, 1946		June 11, '46	98,124.27	Aug. 16, 1946 $75,000.00 (I, 135)
Pd. by purchase of govt. mach.		Mar. 23, '46	18,089.55 (Stip. I, 134)	

38. Vol. III, 812; 815; 826-831; 831; 833-5; 847; 857-9; 863.

29. The petitioner claims interest at 6% on the $297,776.03 judgment as additional damage for the taking, beginning with the date of the taking to the time elected by the government to terminate the taking, June 30, 1946. The property was declared surplus and abandoned to the Company on March 23, 1946 (I, 97). Admittedly from the date the funds shown on the foregoing table were paid into the Registry of Court, the 6% would abate. There remains in the Registry of Court under court order and by stipulation of counsel some funds to avoid satisfaction of the judgment pending appeal (I, 139) (U. S. C. 258(a). Appendix p. 6.

30. The court granted no interest whatever on $45,766.03 of the judgment which was the award for restoration damages to repair and restore the property, the responsibility which was cast upon the laundry company to do what it could best do with this money. The court should have granted interest at 6% thereon from the date of taking on November 21, 1942. Instead of granting interest on $252,000 at 6% from November 21, 1942 (except on the payments made on the deposit made in the Registry of Court as above shown), the court after trial treated each year as a new taking without reference to the original time of taking, and by so doing the petitioner in the judgment rendered was denied $21,314.72, at time of judgment, for interest as additional compensation under the said Statute (40 U. S. C. § 258a). This denial of interest was assigned as error, discussed, and argued to both courts below. Neither court would correct this point relied upon and argued as shown.[39]

39. Vol. I, 101-7; Vol. I, 97, motion in arrest, for new trial. Vol. I, 107.

31. Further the court refused to grant interest on $34,875.50 in supplies that were condemned and taken by the government on November 21, 1942, and not paid for until July 8, 1943. This interest up to the time of the judgment on April 9, 1947, amounted to $1,307.11. Both these items of interest were properly before the trial court[40] and the United States Court of Appeals. Neither granted the interest claimed. The federal statute cited clearly covers the situation of allowing interest as contended by petitioner. Both items now aggregate in excess of $25,000. The statute refers to interest from date of taking for all purposes and makes no such permissive exception as erroneously made by the trial court and affirmed by the Court of Appeals.[41]

32. The trial court erred in refusing to allow $3,153.97 expenses before the appraisers (Vol. I, 40), as taxable costs. These should follow the final judgment.

ASSIGNMENT OF ERRORS
with Discussion and Argument

Summary: Did the trial court commit reversible or harmless error under 28 U. S. C. § 391, Jud. Code § 269, and the decisions applicable to fair trials, (1) by refusing to admit evidence, (2) by refusing to receive certain ma-

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40. Assigned as Error Aplt's. br. below, 66, argued, on pp. 125-6. Contained in Answer stricken, Vol. I, 30. Pet. in error, I, 51(2). Discussed by Court, Vol. II, 183; Motion in arrest of judgment denied, Vol. I, 98, III. Motion for new trial denied, Vol. I, 198(4). There was no disagreement regarding this item and when paid. The facts are not in dispute. The government claims because it voluntarily paid the item and the check was accepted, that concluded the matter. However, the supplies were "taken" along with all else. Payments may be received without prejudice to further rights under Sec. 258a U. S. C. Title 40 2.

41. Vol. I, 95; 101-7 (Judgment on Verdict) Vol. IV.

terial evidence offered, (3) by receiving certain evidence over objection, (4) by giving the court's instructions considered all together, (5) by refusing to give certain instructions requested by petitioner, (6) by the court making innumerable comments before the jury that obviously were made to carry into execution by the jury the court's wishes rather than witnesses' statements, and (7) by overruling the motion in arrest of judgment and overruling the motion for new trial. Vol. I, 40; 97; 107.

II.

Is not the opinion of the United States Court of Appeals in error by stating that the judgment reflected all the elements of value which lawfully might be considered in determining the issue of just compensation to which the petitioner was entitled and that no errors of law were committed by the trial court that would warrant a reversal? The record shows thirty-two points relied upon for reversal, each of which was discussed with record page references given. (Aplt's. br. below, 14-88; discussed and argued Prop. L. I, II, III, and IV, Aplt's. br. below, 89-124.) These references sufficiently refute the opinion of the court below that most of the points relied upon for reversal "are not argued in the brief and virtually all of them reflect the divergence of views of counsel for the Company and those of the trial court relative to the proper standards for ascertaining just compensation." Such statement in the opinion becomes important because the court held, "errors assigned, but not argued in this brief, are waived." (Vol. IV, 6-7.)

[All these questions were presented to the Court of Appeals as shown by the index in the footnotes and Rec-

ord references herein above given under Statement of the Case. The trial court procedure and the judgment were affirmed; Vol. I, 95; 101-7; Vol. IV, 3-14.] Infra, pp. 34-108.

III.

In attempting to arrive at just compensation, was it not error for the trial court to deny the petitioner the right to prove the fair, reasonable market value of its plant as it was at the date of taking, when the evidence shows that the condemnor took and destroyed, as a direct result of the taking, with knowledge that such damage would result, all the existing routes constituting the most valuable of the component parts of the composite property? (Aplt's. br. below, Error XIII, 44-7; supra 8-9; 12 with footnotes.)

IV.

Did not the trial court err in ruling out the evidence of the petitioner that it was completely and entirely driven from business by virtue of the taking and could not re-establish itself because of the obvious result of the taking, and the delayed "piecemeal" pay plan adopted by the government? (Table, supra, p. 19; Error XIX, Aplt's. br. below, p. 61; Prop. L. II, 109; Vol. II, 437-9; supra, 5[3].)

V.

Did not the trial court err in rejecting audits of the petitioner company, competently prepared, from which might be argued the facts that any dealer for the property for any purpose would desire to know? (Vol. II, Ex. 1-7, 188-221; Error VII, Aplt's. br. below, 28-33; argued Prop. L. I, 95-8; supra, 6.)

VI.

Did not the trial court err in rejecting the evidence of the competent witness, Judd, who offered to prove for the consideration of the jury in assessing petitioner's damages the actual value of the trade routes in the course of business and as an inherent part of the business of this servicing company, and who offered to prove what it would cost the petitioner based upon the experience of that company in the City of Omaha to re-establish those routes over the succeeding three years after the plant was abandoned to the appellant? (Supra, 9-12; Vol. II, 367; Ex. 14, 370-1, 372, 376, 380. Error XV, Aplt's. br. below, 51, and XVI, 53. Discussed, Aplt's. br. below, Prop. L. I, 89.)

VII.

Did not the court err, after the petitioner's case was closed, by permitting a government witness (Crowder), who failed to qualify properly as a competent authority on costs, to give his estimates of the probable cost to restore the property, including the building and machinery, which estimates consisted of 594 hearsay items, and over objection, the court remarking in the presence of the jury that such 594 documents were "government documents" and "official reports" and with such prestige were admitted? (Aplt's. br. below, Error XXVI, 70; argued Prop. L. II, 109; cross-exam., Vol. III, 641; 648; 656-669. Supra, 16-21.)

VIII.

Did not the court err in receiving the evidence, over objection, of the government witnesses (Weber and

Sholes), neither of whom was qualified to state that the fair, reasonable compensation for "temporary use" was a sum of money based upon their idea of interest on the value of the building separately, the machinery and equipment separately, and the land separately, as appraised by these witnesses themselves, when the witnesses themselves could give no precedent in the laundry business or any other business for such a method for just compensation, when the court had before it a more fair and just method of arriving at just compensation by the difference in the values of the property before and after taking, or by fixing a percentage compensation based upon the fair, reasonable value of the whole property as a going concern at the time of taking? (Weber, Vol. III, 721-757; Error XXVII, Aplt's. br. below, 72-5; argued Prop. L. II, 111. Sholes, Vol. III, 760-801; Error XXVIII, Aplt's. br. below, 75-8; argued Prop. L. II, 111. Supra. 17, 18.)

IX.

Did not the trial court err in nullifying the evidence of the three officers and owners of the company when they offered their estimates of the fair, reasonable rental value of the physical assets, exclusive of good will, trade routes, and trade name, when such witnesses were the only qualified witnesses to give such testimony? And further, did not the trial court err in withholding its ruling on the government's objection to such testimony and then condemning and rejecting it by instructions thus leaving no other testimony before the jury on such subject, as stated in the instructions of the court except the "expert witnesses" who gave as a proper measure of damage, interest on land, building, and machinery? (H. A. J., Vol.

II, 421-443; Error XVIII, Aplt's. br. below, 56-61. F. J., Vol. II, 454, 460; Error XX, Aplt's. br. below, 63-4. A. L. J., Vol. II, 367; Error XIV, Aplt's. br. below, 48-51. The court's instructions, Vol. I, 152-161. Error I, Aplt's. br. below, 15-19. Argued, Prop. L. I, II, Aplt's. br. below, 88, 109. Supra, 15-16.)

X.

Were not the composite instructions of the trial court so at variance with both the facts and the applicable law as to substantially prejudice the rights of the petitioner by denying it just compensation, even under the measure of damage plan adopted by the court for the conduct of the case? (Court's Inst., Vol. I, 157-165; Error I, Aplt's. br. below, 15-19; Prop. L. III, 124. Inst. requested by petitioner, refused, Vol. I, 172-8. Supra, 12-15.)

XI.

Did not the court commit reversible error in refusing the rebuttal testimony of the petitioner's witnesses to rebut the government's witnesses on the probable cost to repair and replace the broken parts of the building, machinery, equipment, boilers, and power plant, especially under the indefinite plan for measuring damages finally adopted by the trial judge? (Aplt's. br. below, 82, 83, 87; argued Prop. L. III, 124. Petitioner submitted as a Prop. L. that: "Rebuttal testimony, if substantial and material, shall be received (56 Neb. 600, 605; 77 N. W. 120) although properly in the main case"; supra, 19-21).

XII.

In an action in condemnation for just compensation, is it error for the court to instruct the jury that the case

before them is not one for "damages" but is an "inquest"? (Error I-g, Aplt's. br. below, 16. Discussed Prop. L. I, 88; Vol. I, 154-5.)

XIII.

Did not the court commit reversible error when it instructed the jury to disregard evidence on a subject—naming it—which was entirely absent from any testimony or evidence offered or received by either side at the trial? The court instructed the jury to allow just compensation "without any sentimental values, without any good will, or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army." (Vol. I, 159; Error I-i, Aplt's. br. below, 18; Prop. L. II, 109.)

Also "You are not to consider the fact that the owners of this property have a sentimental value there, having spent a lifetime working to build up the institution and they did not want to sell." "You cannot take into consideration the fact that these brothers and their families did not want to sell their property or did not want to lease it." (Vol. I, 154.) Also the many similar expressions concerning matters not in evidence, Vol. I, 155-6.

XIV.

Did not the court err in failing to interpret 40 U. S. C. § 258a as amended (appendix) as granting petitioner as a matter of statutory law 6% interest on the entire judgment of the jury from the date of the taking? Did not

the court err by deciding without judicial precedent 6% interest only from the beginning of each fiscal year as if in fact there had been a separate taking of the same property at the beginning of each fiscal year? (Error XXII, Aplt's. br. below, 66; argued Aplt's. br. below, Prop. L. IV, 125.) To the same effect, did not the court err in failing to grant interest on $34,875.50 of laundry soap, chemicals and other supplies condemned and taken on November 22, 1942, but not paid for until July 8, 1943? Points raised in answer, Vol. I, 30; stricken Vol. II, 183; raised in pet. in error, Vol. I, p. 52; raised again in motion in arrest of judgment, Vol. I, 98, overruled; and in motion for new trial, Vol. I, 108, overruled; judgment entered denying interest as claimed, Vol. I, 103-7. Error XXII, Aplt's br. below, 66; Prop. L. IV, 125; 40 U. S. C. § 258a. (Infra appendix of this brief.) (Also the denial of costs before appraisers of $3,153.97, Vol. I, 40, was error, and should follow the judgment.)

XV.

Did not the trial court commit reversible error when repeatedly throughout the trial and in its instructions to the jury stated that the law announced by the Supreme Court of the United States in *U. S. v. General Motors Co.*, 323 U. S. 373, decided January 8, 1945, and in *U. S. v. Petty Motor Co.*, 327 U. S. 372, decided February 25, 1946, required the court to instruct that no damages could be considered (Vol. I, 155); just compensation must be limited to "rent" to the exclusion of other competent measures of damages of record (supra, 7-14; 19), figured as an arbitrary rate of interest on the land, the building, and the machinery, separately valued (Vol. I, 153) with an additional sum, exclusive of general depre-

ciation, for the estimated or probable cost to repair and replace broken parts? (Trial court refused to set case for trial until General Motors case decided, Vol. I, 74 and 60; motion for new trial, Vol. I, 124, pars. 2-6; Court's Inst., Vol. I, 152; Vol. II, 230-32.) Court made ruling to limit petitioner's case to "rules laid down in the Utah case and in the Chicago case, the General Motors case." Vol. II, p. 232. Neither of said cases involves the taking over from the owner a going concern to be run and operated by the army for its use as the same enterprise, as in the case at bar.

XVI.

Did not the United States Court of Appeals commit error when it held that the decisions in U. S. v. General Motors Co. and U. S. v. Petty Motor Co. were its authority for stating, "We cannot accept this proposition of law"? The said proposition of law is Prop. L. I set forth in petitioner's brief in the court below, 89, and is copied from the opinion below, Vol. IV, p. 8, as follows:

> "When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure such just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of taking. These routes are distinguished from the non-compensable items of good will, loss of profit, and loss of further business. If it is proven that these

routes would be destroyed as a natural consequence known to the condemnor as a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken. The refusal of the trial court to receive competent evidence offered to prove such value is reversible error."

(Evidence on factual matters embraced in above statement of the law was rejected by the trial court. Cf. points relied upon for reversal, Appellant's brief below: Error VI discussed, 27; VII, 28; VIII, 37-8; XIII, 44-8; XV, 51-2; XVI, 53-4; XVII, 54-5; XIX, 61; XII, 43. Errors argued in the Propositions of Law, Aplt's. br. below, Prop. Law, 89-109.) (Court's Inst., Vol. I, p. 154, stated: "Under the Constitution and under the law, you cannot make any allowance whatever for property that is not taken.") Supra, 6-13.

XVII.

Did not the court err by failing to properly interpret and apply the condemnation statutes (supra, 3; found in appendix to this brief) relied upon by the government in its petition (Vol. I, 4-5) filed November 21, 1942, and the same statutes pleaded in defense by the condemnee in answer (stricken, Vol. II, 183) and in its requested instructions (refused, Vol. I, 172), principally in the following particulars:

1. These statutes should properly be interpreted in pari materia.

2. When so interpreted, Section 171, 50 U. S. C., as amended, does not clearly cover the case at bar, because the condemnee possessed land but did not possess "the

temporary use thereof or other interest therein." Instead, the government created a "temporary use" of its own by its petition. In so doing it took over an operating company indefinitely but with power to terminate.

3. The result of the taking rather than the form of the petition determines the extent of the condemnation for the purpose of paying just compensation for the taking, and this power of determination of just compensation is lodged exclusively in the judicial branch of the government.

4. Congress has protected previous owners and the government as well by enacting Section 722, as an amendment to the Act of October 16, 1941, 50 U. S. C., entitled, "Return of Property to Original Owner." So that the value before and the value after or when returned to the previous owner or offered to, has been legalized in this statutory manner. Prop. L. II, Aplt's. br. below, 112-123, brought this point to the attention of the Court of Appeals. It failed to recognize the point.

5. This difference in the value at time of taking and at time of return, while recognized by Congress and as a proper method by competent courts, was erroneously denied the laundry company in this case (cf. petitioner's instr. refused, Vol. I, Inst. No. II, 172; No. X, 175; No. XIII, 177; No. XIV, 177. Answer, Vol. I, pleading the statutes, Vol. I, 21, at pars. XV, XVI, XVIII, 28-9. Order striking same, Vol. II, 183; Vol. I' 863. Motion for new trial, Vol. I, 107, overruled. Special exhibits comprising these statutes were attached to the motion, Vol. I, 126-134. Error in striking them from consideration set forth and discussed, Aplt's. br. below, 26; Prop. L. argued I and II, Aplt's. br. below, 89, 109.

All condemnation statutes in question are copied in full in the appendix to this brief.

The references above to "Aplt's. br. below" are on points for reversal herein presented with same numbers, I to XXXII following.

POINTS RELIED UPON FOR REVERSAL HEREIN AND IN COURT BELOW WITH DISCUSSIONS AND ARGUMENT

[All oral testimony and all rulings of the court, the court's instructions (I, 150-169), instructions tendered by petitioner (I, 172), exceptions (I, 165), and the rulings on all evidence and objections are set forth verbatim in the record. As above stated, counsel agreed to the designation of the record (I, 145). Only some of the voluminous exhibits are given in part, as clearly indicated, and the remainder are described by agreement of counsel (I, 143-9). All else in the record is printed verbatim.]

[Under decisions and rules where error is predicated upon evidence offered and rejected the proceedings thereon must be set out in full. Accordingly that has been done.]

I.

(Appellant below is Petitioner herein.)

The court erred in giving the following as portions of its instructions to the jury (I, 150), *because the statements are in conflict with the court's instruction that was given that the petitioner was entitled to the fair, reasonable market value of its property as of November 22, 1942, and was entitled to be placed in as good a position pecuniarily as it was on November 22, 1942.*

I-a

"The court has gone further and said that the measure for juries and courts is the fair, reasonable market value of the property at the time it is taken. That rule worked very nicely in actions where they took the fee title. * * * " (I, 152.)

I-b

"The trouble, however, comes from the fact that there is no fair market price for the temporary use of laundries for a term of months." (I, 153.)

I-c

" * * * but when we come to deal with laundries, there is no evidence of anyone having rented a laundry for three and one-half years, or three years and seven months. There is no evidence of any laundry having been sold on the market." (I, 153.)

I-d

"This case is being conducted in the nature of an inquest to determine just what our position is, and in making that inquest, we have to gather and consider any fact or circumstances that may be considered and keep within the line of just compensation. * * * " (I, 154.)

I-e

" * * * The property taken was the use of the laundry machinery, the building, the grounds, and everything connected therewith, except the trucks or delivery service that was not taken. Under the constitution and under the law, you can not make any allowance whatever for property that is not taken." (I, 154.)

I-f

"In search of a yardstick, I have permitted evidence here of the value of the property itself. Not

that it was necessary for the purpose of the measure of damages, but it was a yardstick that we might consider in trying to find what was just: As I have said, there is no evidence of any sales, there is no evidence of any leases, or anything of that kind in connection with laundries." (I, 154.)

I-g

"* * * The fact that the Kimball Laundry Company undertook to place some element of value on the property, since it was a going concern, is not permissible, and is not competent. It is not the thing that we are appraising here on that we are holding the inquest on. The reason for that is that this is not a damage suit. * * *" (I, 155.)

I-h

(I, 156) "In this case I properly permitted the owners of the property to give their opinion of the value of the property. It developed in the cross-examination of these owners, when they were fixing the figures that they used, that they were considering elements they had in mind that were not proper to be considered.

"The first witness in that respect is Mr. A. L. Jacobberger. On his cross-examination, after fixing what he considered a fair allowance, he was asked what the elements were that he had in mind and he referred to the fact that there was additional expense he would be put to as a result of the taking of the business. In this expense there were many different items, some of them being storage of merchandise that was not taken, storage of trucks that they had been using on their deliveries, storage of customers' clothing, and these items he had considered in making up his figure. He also testified that as a result of the taking he had taken into consideration that he had been put to the expense of apprais-

als and audits and matters of that kind; expense that ran into the neighborhood of eight or nine thousand dollars. None of these items are allowable in this action because they are personal to the owner. The property taken has nothing to do with this, and so I instruct you that these elements Mr. A. L. Jacobberger has referred to should not be considered by you in appraising his opinion of the value of the property, and you should not consider any of these matters he has seemingly included in making up his sum total.

"In addition to Mr. A. L. Jacobberger, I find that Mr. Harry Jacobberger, in his cross-examination, referred to the elements he had taken into consideration. He testified that he had taken into consideration the fact that the plant was a going concern. That is not an element of just compensation, and you are instructed to disregard it.

"Mr. Fred Jacobberger, when he testified, was asked what elements he took into consideration and among other things he thought they were entitled to an amount he fixed, stating that he would certainly ask it of anyone (I, 157) who wanted to rent the place from him. He also testified to a figure for taxes, insurance and a few minor expenses, such as storage of these trucks. These are elements you cannot take into consideration. You may consider taxes and insurance in a collateral way in trying to get at a rental value.

"With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure. * * *"

I-i

"* * * In that you consider all of the elements figuring what it would cost to put the property back as it was, as near as you can, allowing just compen-

sation for the use of the property, without any sentimental values, without any good will or the fact that it was a going concern, or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army." (I, 159).

I-j

" * * * If you can not find an expert who is in a position to qualify and tell you that it is worth so much money, then you have to figure it out for yourself by considering what it cost when it was built, how it has been used, what its capacity is—all of these things that will occur to you when you are trying to arrive at a value. Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it whenever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here. * * * " (I, 159.)

I-k

" * * * Your question is the value of the property at the time it was taken, not now. It is the value of the use of the property and when we get your figures the court will then allow such interest as the law permits. * * * " (I, 161.)

The Kimball Laundry Co. was granted exceptions (I, 166) to each and all of the foregoing instructions.

II.

The court erred in overruling the following Exceptions of Petitioner to the Court's Instructions:

II-a

(I, 165) "Mr. Hotz: The respondent, Kimball Laundry Company excepts to that portion of the Court's instructions which referred to the words 'going concern' taken from the testimony of Mr. A. L. Jacobberger and Mr. Harry Jacobberger, for the reason that in their testimony they specifically excluded, under the rulings of the Court, all reference to trade routes, business and good will, and so stated in their testimony.

"2. That the instructions are not explicit enough in reference to the matter of the element of damage based upon the value of the property, especially the laundry machinery and equipment as it existed in November of 1942, and at the present time. While the instruction was given, it seems to counsel for Kimball Laundry Company that it was detracted from and modified in the subsequent instruction that seemed to leave to the jury no other alternative but the repair items to place the property in the condition that it was in 1942.

"3. That the reference by the Court to consequential damages not being permitted is contrary to the law and the decisions in the United States Circuit Court of Appeals for this circuit and that consequential damages which inhere in and are directly connected with property and are destroyed, are a part there of and become an element of damage for the consideration of the jury.

"4. That the word 'rental' as used by the Court in the instructions and also as referred to in the general verdict (I, 166) of the jury submitted by the Court, is not a proper term either under the statute or the decisions, and while it may be used as an illustration, it is contrary to law, as it all is a matter of damage for use, whether temporary or permanent.

"5. The Kimball Laundry Company further excepts to the failure of the Court to give all of the instructions requested by the Kimball Laundry Company, being numbers—

"The Court: You will get specific exceptions on those.

"Mr. Hotz: We except to the instructions given by the court from instructions suggested by the government, numbers 1, 2, 3, 4, 6 and 8, and especially in connection with Instruction 6, because of the element of consequential damages therein referred to. The general exception is made that the court has failed and refused at this time and throughout the trial to recognize as an element of damage the destruction of the trade routes and the customers lists because of their contractual relationship to the Kimball Laundry Company and as an element of damage inhered in and as a part of the property.

"The Kimball Laundry Company also objects to the request for the findings of different elements to make up the total damage, it being the law that the damage should be fixed in one lump sum and that the only purpose in arriving at the separate elements of damage is to aid in arriving at the one sum of damages."

"The Court: The exceptions will be noted and overruled and the instructions in that regard will stand as they are. * * *."

II-c

(I, 167) "Gentlemen, my attention has been called particularly to the fact that there was testimony offered by Mr. A. L. Jacobberger and Mr. Harry Jacobberger with reference to an item of $70,000.00 which they said would cover the use of the property while they were putting it back in shape. I withdrew

that question from your consideration by retaining jurisdiction and any question that may arise hereafter as to any damage in that respect, the court will then be in a position to take care of. You can not anticipate now that there will be any such occasion arise. Have I made myself clear? . . . "

III

The court erred in failing to give the following instructions requested by the petitioner:

III-a

(I, 174) No. VI. (Not Given)

"You are instructed in a condemnation proceedings when you arrive in your deliberation at the value of the property as a unit, to consider its special use to the Kimball Laundry Company as a laundry and dry cleaning establishment; and the criterion or test of what the value was on November 22, 1942, is not what the property is worth to the condemnor but its value to the condemnee, Kimball Laundry Company. The question is what has the owner lost, not what has the taker gained."

III-b

No. X. (Not Given)

(I, 175) "You are instructed that the Government took from the Kimball Laundry Company the temporary use of land and the personal property thereon or used in connection therewith. You are instructed that the term included the Kimball Laundry Company's property on the northwest corner of 15th and Jones Streets, and that it covered the land, the five-story building, all the machinery and equipment contained therein, and the (I, 176) power plant and power equipment, and all personal property used thereon or connected therewith excepting

the Kimball Laundry Company's delivery trucks; that said property at the time of the taking was run and operated by the Kimball Laundry Company as a fully equipped modern and efficient laundry and dry cleaning establishment, located in the business section of the City of Omaha, and that said property was of such capacity as to service the volume of business necessary for the Government needs, and that all these elements of value should be combined by you in arriving at the value of said plant as a unit on November 22, 1942. And in arriving at your conclusions of value you shall take into consideration the trade routes established by the Kimball Laundry Company as distinguished from the loss of business or good will. If you find that said trade routes, both residential and commercial and others, had a definite intrinsic value, readily determinable; that the Kimball Laundry Company was under obligation to service said trade route customers and was doing so at the time of the taking; and that by the taking these routes were destroyed and became valueless to the Kimball Laundry Company—then you shall include that trade route item, in addition to all other items of value, in making up your award for damages and include the same in the total."

III-c

(I, 176) No. XI. (Not Given)

"You are further instructed that in arriving at just compensation to be paid to the Kimball Laundry, you may take into consideration the value of the customers' routes, the number of customers, the volume of business; and if you find that such customers' routes and customers had a value which inhered in the Kimball Laundry Company's property as a part thereof and that the same was damaged or destroyed directly by the taking, then you shall find for the Kimball Laundry Company to the extent of the value

of the routes so destroyed in the taking, even though you find the Government had no occasion to take and did not take or operate said laundry's customers' routes."

III-d

(I, 177) No. XII. (Not Given)

"You are instructed to find the total value, rather than the separate value, of the parts of the Kimball Laundry Company that inhered in the property at the time of the taking. In that regard there is before you separate evidence of the value of the real estate, the machinery, the equipment, the power plant, and other elements, each separately valued. These are before you separately only to show the value of the total or the value of the whole laundry as it existed on November 22, 1942, when taken by the government, and you may not value each item separately and add them to make up the whole, but instead you must value the whole plant as a going unit, and determine its value in dollars and cents for the purpose of arriving at just compensation."

III-e

(I, 177) No. XII. (Not Given)

"You are instructed that it is not necessary for you to gauge the damages for just compensation to be paid by the government in terms of a percentage of the land, a percentage of the building, and a percentage of the equipment, as the measure of your verdict, but you may gauge the full measure of your award based upon what you consider fair and just compensation for the taking of the whole. In determining just compensation to be awarded for this property for the period in controversy, you may consider the after-value of the porperty and subtract it from the before-value; that is, the value as it existed

on November 22, 1942, and substract the value of the property at this time."

III-f

(I, 177 No. XIV. (Not Given)

"You are instructed that the petition filed by the Government in this case condemned a temporary use of said premises, and that the property sought to be condemned was only the physical assets, exclusive of trade routes and business. However, if you find from the evidence that the effect of the taking, even though the petition states 'temporary use,' actually resulted in appropriating the Kimball Laundry Company as a going business with the result in effect that said property was completely (I, 178) taken from the Kimball Laundry Company, then you are instructed to find the fair, reasonable market value of the Kimball Laundry Company at the time of the taking on November 22, 1942, with all the elements that go to make up the value of a large going laundry and dry cleaning business and render judgment in favor of the Kimball Laundry Company for said amount. In such event you are instructed that the real and personal property would remain as an asset of the Government for the purpose of resale to the Kimball Laundry Company or to some other purchaser or to remain the property of the federal Government if it so desires, in which contingencies you need not be concerned in this action."

IV.

The court erred in giving, over petitioner's objections, the following instruction to the jury requested by the government:

IV-a

(I, 163) "Here are some instructions that have been requested by the government and they are like

wise entitled to consideration because they are given to you by the court and correctly state the law."

IV-b

(I, 164) "The jury are instructed that the just compensation to be paid in this case is the value of the property taken, in this case, the right to use the physical property. Only in the sense that the owner is to receive this value is the owner to be put in as good a position financially or pecuniarily as if his property has not been taken. This value is not the value to the owner for his particular purposes or to the condemnor for some special use, but a so-called 'market value.' Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are not to be considered in determining just compensation in this proceeding. Interference with the business, frustration of the business enterprise, inconvenience to the owner, the unwillingness of the owner to part with his property temporarily, or the need of the government (I, 165) for the property are not to be considered and are not to be the basis for the allowance of just compensation. You will, therefore, disregard all evidence of such items.

"The jury are instructed that no consideration shall be given to or allowance of just compensation made for any litigation, auditing and appraisal expense incurred by the owner and evidence of such expense shall be disregarded. * * * "

V.

Error by striking pleadings of petitioner.

The court erred at the outset of the trial on March 4, 1946 (II, 183), in striking all of petitioner's answer

(filed August 23, 1943; I, 21) and all of petitioner's petition in error on appeal from the board of appraisers (filed December 18, 1943; I, 44), and in striking during the trial on March 20, 1945 (III, 863), another petition on appeal (filed March 18, 1946; I, 91). No rulings were made on the petitioner's application for pretrial hearing filed on April 3, 1944 (I, 55), including request for pretrial decision on propositions of law (I, 126). The court at the opening of the trial had presented to it the motion of the Kimball Laundry Co. that the court "follow the State of Nebraska practice and procedure as nearly as may be in this condemnation case (40 U. S. C. 258a)." (This statute in 40 U. S. C. is found in appendix herein, pp. 4-5.) Exceptions were allowed (II, 183). Error occurred in these rulings because petitioner was placed in the trial without the issues being formed in writing as provided in both the federal and state courts in condemnation proceedings (State Court statutes, appendix p. 15). The prejudicial result of this group of errors during the progress of the trial will appear in conjunction with other resulting errors set forth (II, 183-7) hereinafter.

VI.

Error in court's assumption that the petitioner claimed damages for good will. How question arose.

The court erred throughout the trial in assuming without any supporting evidence that the petitioner was claiming damages to its business and good will as distinguished from trade routes as elements of value. The contrary appeared of record from the statement of the witnesses. Page reference will be made to this testimony.

The court's first ruling is II, 187. (Whenever the name of counsel "Murphy" appears, he was counsel for the government.)

> (II, 187) "Mr. Murphy: Petitioner objects to any statement of counsel as to the value of the laundry truck routes or the value, or supposed value of the business or good will as incompetent and immaterial and not within the issues in this case, and not within anything taken by the government in this action.
>
> The Court: I think that is true. Let us keep away from the question until we can meet it squarely on the evidence you offer. Let's confine your opening statement to matters that will not be in dispute until you get to them."

VII.

Error in rejecting all of petitioner's financial statements.

The court erred in ruling out all the audits made by the petitioner's first witness, C. L. Hillmer, whose qualifications were admitted and who had made all the audits for the company for 26 years. The books of original entry were in the courtroom (II, 187-8). These audits ruled out by the court were complete. Gross income from laundry operations from 1924 to date of condemnation was shown to be $6,728,454.64 (II, 190; Ex. 1). Among the disposition of funds were shown officers' salaries, $393,242.99 (II; 191); dividends paid $147,900 (II, 191). and other items customarily needed to determine the value of a plant. These were ruled out as follows:

(Ex. 1)

"The Court: That objection will be good. You will have to separate the years so that we can determine which is remote and which is not. Mr. Hotz: In the exhibits that we have that are following we do that by the growth of the business and the productivity. The Court: Let us get the foundation. We will do the figuring afterwards. Objection will be sustained." (II, 189-90.)

(Ex. 2)

Exhibit 2 of the witness Hillmer was refused (II, 198). It showed all costs on the books to the company on December 31, 1942, exclusive of good will, trade name, and advertising. The itemized total was $683,365.77. The advertising during the period 1924 to 1942 was $148,910.01 (II, 200; Ex. 2), and contributions to charitable and business organizations, $5,119.50 (II, 200; Ex. 2), both were charged to expense and not capitalized as good will.

(II, 198) "The Court: These statements include so many other items as to confuse the issue. You have the books here and if he has these statements separately, we will be glad to have them and examine them. It will probably save time by doing that. Otherwise, you have book values and date and amount that was paid and when you get the evidence, we will determine whether or not it is of evidential value, or whether it is too remote, or whether it is within the time of reason."

This ruling is contrary to the face of the exhibit, and the court erred accordingly.

(Ex. 3)

Exhibit 3 contained the same items as Exhibit 1 except was the 5-year period from 1938 to December 31,

1942. For that period Exhibit 3 showed officers' salaries, $112,676.84; repairs to building, $10,995.63; repairs to equipment, $29,531.14; purchases of equipment, $30,940.18; dividends paid, $97,900; and other items shown (II, 201; Ex. 3). This exhibit was ruled out with Exhibit 2 (II, 198) for the same reason: It was not "remote."

(Ex. 4)

Exhibit 4 was refused (II, 203-4). It was a comparative statement and analysis of net profit, itemized year by year from the beginning of the business in 1924 to November 21, 1942.

"The Court: Due to the fact that this exhibit contains items that I think it should not properly contain in its present form, I must exclude it, but if counsel will segregate in a separate statement the item showing the net earnings of this laundry from 1924 to 1942, until November 1942 (II, 203), and the other item of depreciation taken, I will receive it. I can not receive it with a lot of other items I think should not be in here.

Mr. Hotz: There were no other items excepting incident to the laundry business. They are comparatively in the second column—for example, you take the year 1924, the net profit from laundry operations before deducting depreciation and income tax, giving the date and certain figures; the net profit from all sources before deducting depreciation and income tax, is the same figure, and it goes on down. There are comparatively small items and interest and things of that sort that came from their surplus account. It does not amount, over a long period of years even, to a great deal. Column One shows their total net profit from laundry operations, shows the total of that up to November 21, 1942. Then it shows the income tax paid. Naturally that might be of in-

terest to know what that is. It might have probative force to see what that is. Then depreciation taken on income tax returns—that means on the whole plant—and net profits after deducting depreciation and income tax, but that second column hasn't any great significance, and if they had their surplus in the bank and got a little interest on it, that was shown properly as a matter of bookkeeping and accounting.

"The Court: The Court has ruled." (Refused.)

(Ex. 5)

Exhibit 5 (II, 206) shows for the 10-year period to November 21, 1942, a total net profit of $598,512.35 before deducting depreciation, income taxes, and officers' salaries. It then shows officers' salaries, income taxes, depreciation taken for income tax purposes, the net additions to surplus from laundry operations, of $121,458.14 (II, 206), and the surplus account increase from $173,538.26 in 1933 to $195,336.61 at the time of taking in 1942. The court ruled out the exhibit and stated (II, 205):

"The Court: That will be sustained. Prepare a statement. I will not permit anything to go to the jury except what I think is competent to be received."

The court did not state what was competent to be received. The statements contained in this exhibit and the accompanying Hillmer audits were exactly in accordance with proper bookkeeping methods to show the status of a business concern about which a buyer would wish to learn. The refusal was error.

(Ex. 6)

Exhibit 6 was a comparative balance sheet showing the growth of the company by years to the date of taking. The amount of invested capital, the officers' salaries drawn each year, the increase or decrease in the investments in fixed assets, cost of real estate, building, laundry machinery, power machinery, dry cleaning equipment, cold storage equipment, feather machinery, office equipment, etc., each set forth (II, 214). Also the comparative balance sheet separated into shorter term, as suggested by the court, showing the percentage of cost to repairs to the building year by year (II, 217) and the percentage of repairs to the cost of machinery and equipment year by year (II, 218). The cost of equipment as of 1942 at the time of taking was $405,294.81, and $205,035.12 cost of the building at time of taking (II, 217). This exhibit was ruled out, the court stating (II, 212):

> "Mr. Hotz: I offered the whole exhibit and not the one page, because the exhibit is a composite exhibit. It is a comparative balance sheet and unless it is offered with the balance of the exhibit it is almost unintelligible. I offer the exhibit in its entirety, Exhibit 6.
>
> The Court: It is the ruling of the Court that all of the exhibit is incompetent and not material to the issue, the second to the last page, which may be received, if counsel so elects."

The court erred in so ruling, because it was evidence to support the fair, reasonable market value of the Kimball Laundry Co. as it stood on November 21, 1942, exclusive of trade name, good will, and future business, and similar items which were not in controversy and were not included in the exhibits.

(Ex. 7)

Exhibit 7 shows gross income of the Kimball Laundry Co. year by year, itemized from 1924 to November 21, 1942. It was refused by the court. The purpose of the exhibit was fully explained to the court (II; 219-221). This exhibit did not show net profits. It was a gross dollars and cents volume of business, upon which the petitioner based its estimate of $400,000 as its annual gross business at the time of taking—an increase from a low of $274,913.90 in 1933. When considered with other Hilmer exhibits, or separately, the value of the property taken, because it was productive, was material. The court erred in ruling out the exhibits.

VII(b).

Offer to prove contents of all foregoing exhibits from books in court was erroneously denied.

At II, 221-3, an offer was made to prove the contents of the exhibits from the books of record and of original entry in the courtroom, with which the witness Hilmer was familiar. The exclusion from evidence of all these exhibits is assigned as prejudicial error, because the petitioner was left with no figures upon which to base the financial condition of the petitioner, or its gross income, its earnings, the cost of its property as carried on its books in 1942, or any other similar data. Expenditures for repairs and upkeep of the machinery and equipment were ruled out. Obviously the court did not seem to understand that the exhibits actually contained all the evidence essential to show value, not warehouse space, floor space, or similar data not in the case,

but for a going business dealing only in services, not merchandise, upon which laundrymen would base value.

VIII.

Witness McDougal's audits on trade routes.

(Ex. 10)

The court erred in ruling that petitioner's Exhibit 10, compiled by witness McDougal (II, 234), which showed the dollars and cents income from 1936 to November 21, 1942, broken down into various classifications of laundry and dry cleaning services to show value of the plant, could be received only under the following conditions (II, 230, 234-5):

> (II, 230) "Mr. Murphy: If the Court please, petitioner objects to the offer of Exhibit 10 for the reason said exhibit is incompetent and immaterial and covering, as it does, solely business earnings, is not a proper element of proof of just compensation in this condemnation action. I might state to the Court that I have in my hands a copy of an opinion of the United States Supreme Court just handed down on February 25, 1946, that I would like to have—

(Counsel was referring to *U. S. v. Petty Motor Co.*, 327 U. S. 372, 66 S. Ct. 596.)

> "The Court: I have it right here. I have not had time to study it yet. I got it just this morning. You have this in dollars and cents. I am inclined to think it is admissible if it were in poundage or volume so as to establish the amount of business they were doing."

The court remarked (II, 231):

"* * * This document, if it showed the poundage, or if it could be supplemented with a statement of the poundage, would show to some extent the capacity of the building and of the plant, what it was capable of doing, and this would be a consideration that a prospective lessee and the owners would necessarily have in mind if they were dealing at arm's length. Under the Utah case, as under the General Motors case (323 U. S. 373, 65 S. Ct. 357), that which is personal to the owners can not be considered. I can not allow it to interfere with the valuation or determination by the jury of the value, which is the basis of our inquiry. Any kind of evidence, even though it is remote, I have concluded that the Court should permit because of the difficulty in proving up in this case, and since this case has to stand by itself—it is the only laundry business that I know of—it is surely the only one in Omaha, and there are no records or decisions on laundries. Consequently, we have the problem of how to prove up in Nebraska in condemnation of laundries. * * * "

These two cases (discussed under points of law hereinafter) do not govern the measure of damage in the case at bar, because in the Petty Motor Co. case a leasehold was condemned which the condemnee had for storage space, and the expense of moving and relocation were denied because the condemnee's lease was at an end. In the General Motor Co. case the condemnee also had a long term lease which the government wanted but only a part, and the court ruled the damages were recoverable for the expense of moving and relocation and destruction of equipment, obviously because the removal from the warehouse of the General Motor Co. would be only temporary and the company would then move back. It was a simple matter of square foot rental plus resulting losses enumerated.

In the case at bar the condemnee owned the property outright. It had no temporary use. The court erred, therefore, in ruling out all exhibits and evidence which would show the fair, reasonable market value of the Kimball Laundry Co. at the date of taking. This valuation was absolutely necessary for petitioner's starting point during the trial of the case. The value of what was turned back when the property was declared surplus and abandoned would likewise be material evidence for the jury's consideration as the measure of damage.

The court erred in denying the exhibit and its only understandable purpose, i. e., dollars and cents income from the various departments, as a "laundry plant."

At II, 234-5 the court stated:

> "The Court: I made the remark that if he would break it down into quantity so that we could understand the capacity of the plant it might be descriptive, and if he would give me that assurance I would receive it now in the record, with the understanding that if he does not supply the supplemental evidence that I will strike it."

The witness McDougal stated (II, 232-3):

> "Q. When we had Exhibit 10 yesterday while you were on the witness stand, a statement was made with reference to poundage, if you had any record of poundage. Did the Kimball Laundry Company keep any record of laundry as bundles distinguished from pieces?
>
> A. We did on certain types of laundry, but that wouldn't cover your laundry, due to the fact that there is no poundage on your finished shirts.
>
> Q. There is no poundage on many other items?

A. And many other, there is no poundage in the laundry business.

Q. For instance, in the dry cleaning?

A. No poundage on your dry cleaning."

In reference to the poundage demanded by the court as a qualification for the ultimate use of the exhibit, the objection was made to the court (II, 230) in speaking of poundage,

"Mr. Hotz: That doesn't mean anything unless you can tell what it is in dollars and cents."

The total for the 5-year period of gross business immediately preceding the taking on November 21, 1942, in that laundry on laundry operations alone was $2,496,105.55. This figure was broken down into nine subheadings as shown at II, 234, and duly certified by the auditor.

It was error for the court not to have admitted Exhibit 10 (II, 234), and all it was worth to show valuation of the laundry when it was taken, because this statement, coupled with the audits of the witness Hillmer (Exs. 1-7, all of which were ruled out except page 6 of Ex. 6) was a clear, definite, and acceptable financial statement of this particular laundry upon which other laundrymen might testify as to valuation.

(Ex. 11)

The court erred in limiting the value of the witness McDougal's Exhibit 11 (II, 236-7), showing the total regular trade route customers, exclusive of specialty department, on November 21, 1942, to be 15,093; customers who delivered laundry and called for it at the desk of the company, 1,500; special customers, 4,648; customers

requiring seasonal work consisting of table linen, spreads, rugs, comforts, blankets, and lace curtains, 20,802; or a total of customers of 26,950, plus 15,093, or a grand total of 42,043 in which there were no duplications (II, 237).

> (II, 236) "Mr. Murphy: * * * It is evidence relating solely to skill or management and good will and number of customers and business, rather than the plant or its capacity. The Court: I think it is some evidence of capacity. * * * "

The exhibit showed

> " * * * The Government went into possession of the Kimball Laundry on November 22, 1942, and none of the customers of the Kimball Laundry Company were or have been thereafter serviced by the Kimball Laundry Company."

(Ex. 12)

Exhibit 12 (II, 241) was an itemization of the name and amounts in dollars and cents of the Kimball Laundry Co. patrons under the heading of "Special Accounts for the Years 1938 to Nov. 21, 1942, Inclusive." These the court received with Exhibits 10 and 11, with the same admonition that it was only for the purpose of showing "volume," and (II, 240) "conditionally that you couple it up with the poundage." The court erred in keeping from the jury elements of valuation based on understandable dollars and cents items, as poundage meant nothing to either the court or the jury.

(Ex. 13)

Exhibit 13 (II, 244) was refused by the court. This exhibit was made up from 1936 to November 21, 1942,

and showed the expense incidental and the manner in which the respective trade routes were built up and handled during that period of time. The offer was made to show that the route men were paid $237,654.83 (II, 244) of guaranteed salaries and salaries and commissions during the previous five years as an item of expense to keep and maintain trade routes.

> "The Commission Account following is for laundry trade acquired and held by these routemen over and above their fixed salaries for the years 1936 to November 21, 1942, inclusive."

The court stated in ruling out the exhibit (II, 244):

> "The ruling is based on the proposition that the route was not taken, was not condemned, and is not involved in the suit."

Error was committed, because the routes were destroyed by the taking as a matter of common sense deduction.

IX.

Court's error in the limitation placed on Ex. 21, which showed cost and value of machinery and equipment on November 21, 1942, and in November, 1945, by experts Goodwin and Kinder for petitioner.

The court erred in limiting the value of the petitioner's Exhibit 21 (II, 258-60), consisting of 594 items of machinery and equipment valued at $336,976.09. The expert witnesses on values were from the American Laundry Machinery Co. and had both appraised laundry machinery and equipment for the government. The witness Goodwin had appraised the same items with the govern-

ment witness Sholes when the plant was taken over in November 1942 (II, 246). (Original Vol. III, 1066-1 to 1066-23; print II, 258-9.) The witness Kinder qualified as an expert (II, 252), and had done laundry appraisal work for the government (II, 252-3). These witnesses found the fair, reasonable market value of the machinery and equipment in November, 1945, was $120,699.75 (II, 260), and when the plant was taken on November 21, 1942, was $273,831.39. The difference in value was $153,131.54 (II, 260) during that period of time. Ex. 21 was offered by the petitioner for the purpose of showing the value of the particular items when the business was abandoned and declared surplus by the army on March 22, 1946 (I, 97; II, 310-11).

Further explanation of this exhibit was given by the witnesses that in the blank space in column 3 under the "Value Installed Nov. 1945," there was $11,492.31 of items that were in the laundry plant on November 21, 1942, but could not be found when the appraisal was made in November, 1945 (II, 254-8). The court erred specifically in reference to this exhibit of the petitioner by ruling out the element of cost of the particular machines to the Kimball Laundry Co.

While the court permitted the value in 1942 and 1945 to go in, the purpose of the exhibit to show damages by the difference was ruled out by the court's instructions to the jury that only fair rental for use was involved and extraordinary damage. The hard usage shown reduced the value of the machinery, and it was error to instruct the jury that there was no method to judge the measure of damage, when obviously the difference in

value before and after the taking herein shown, was clear and explicit (Error supra, pp. 34-39) (Infra 64-67).

X.

The Latenser exhibit on reproduction building cost as of 1942.

The Court erred in limiting the scope of the effect of the petitioner's Exhibit 19 (II, 264), the witness being John Latenser, Jr., the architect who built the building and installed all the mechanical parts such as heating, plumbing, etc. The exhibit gave the cost in 1925 and the additional cost in 1935 when the building was improved and one story added. The reproduction cost in November, 1942 was $280,348. The court stated in response to the objection that the various columns in Exhibit 19 were of no value, and (II, 263):

> "* * * and with that as a keystone (the figures in the three columns), we could then ascertain what the fair, reasonable rental value of that property would be. For the reasons stated your objections are overruled."

The court erred in confining the consideration of the jury to an important item such as the building as an isolated value upon which interest was to be awarded as "rental," as appears from the court's instructions to the jury, rather than the building as a part of the whole plant as claimed by the petitioner (Error supra, pp. 37-38).

XI.

The court's ruling in effect that "poundage" instead of income was the only proper basis to determine value of the property, was error.

The court erred in ruling out testimony of A. L. Jacobberger, 45 years of age, residing in Omaha, who had been in the laundry business since 1918 and was the secretary and operations manager of the petitioner at the time it was taken and continued with 185 other employees in their respective capacities after the taking by government on November 21, 1942, he stated that by the condemnation proceedings "we were put out of business." (II, 266.) The skilled employees were replaced with a maximum of 100 prisoners of war who had no experience in the operation of laundry machinery and equipment. This had its bad effect on the use of the plant.

In order to satisfy the request made by the court on poundage in the examination of the witness McDougal, A. L. Jacobberger offered Exhibit 24 (II, 282-3). Some of the "poundage" was in numbers, such as shirts, there having been 665,357 shirts laundered in 1941 (II, 282). The court erred by limiting the exhibit to show capacity rather than value of the business as a going concern. The exhibit was brought in at the request of the court.

> (II, 282) "The Court: Suppose we agree these documents, and I take it from his testimony they are all alike, show on their face the period they cover, show the amount, and they may be received in evidence for the purpose of showing capacity, or tending to show capacity, without further identification or objection. I will receive your book in evidence, and proceed."

The court then called for a price list and stated (II, 288):

> "The Court: The price list for the year 1942 for all rough laundry. We don't care about the

fancy stuff, because it is too much work to break it down, but there is a lot of laundry, the bulk of it, so that we can get some idea of the capacity of the plant.

"The Witness: The O. P. A. file, price list. There is a copy from the O. P. A. records."

(Ex. 56, "more poundage")

The witness Jacobberger produced Exhibit 56 (III, 862) which showed the capacity of certain machines, which is evidently what the court desired. The court erred because after receiving the capacity of machines and poundage (III, 862), there was nothing concrete or practical upon which the jury could judge fair, reasonable market value of the plant on November 22, 1942. Error is therefore assigned to this last ruling of the court, principally because the financial statements (Exs. 1-7, Hillmer; II, 188-221) were all ruled out and the testimony of the witness McDougal likewise nullified in connection with the customer's lists and amounts (II, 229-244), because confined only to capacity rather than in support of the financial worth of the company.

XII.

Plant unsafe at time of trial.

The court erred in ruling out testimony of the witness, A. L. Jacobberger.

(II, 297) "Q. Is the condition of the machinery and equipment now in the building of the Kimball Laundry Company, known as the Kimball Laundry Company, as shown on Exhibit 21, in such condition that the plant could be operated by the Kimball Laundry Company?

Mr. Murphy: Objected to as irrelevant and immaterial; going into a matter of business operations and not the condition of the machinery, and not the best evidence.

The Court: Sustained.

(II, 298) Mr. Hotz: We offer to show by this witness that the plant can not be operated at all at the present time by the Kimball Laundry Company owing to the destruction of certain machinery which the witness is ready to describe and show is necessary for the operation of the laundry, and the only reason that it has been operated by the government is that the government itself has put in a temporary machine to perform the operation, but that the machinery of the Kimball Laundry Company in that respect is gone and the plant can not be operated at all."

The court erred when it said in the presence of the jury:

(II, 298) "I can go down and operate one by myself and I don't know anything about a laundry."

This testimony given by the court itself was highly prejudicial and was erroneous for the court to have so stated.

Further proof is shown from Exhibit 22A, a letter from the commanding officer, Col. E. F. Ketcham, of the Corps of Engineers, addressed to the Kimball Laundry Co. on January 11, 1946 (II, 310-11), which stated that the boiler was unsafe and that:

(II, 311) "4. These instructions should be issued in writing and posted with the laundry officer in charge and the chief operating engineer in order that the lives of the operators will not be endangered during the remaining few weeks this laundry will be operated by the Government.

By Command of Major General Craig:

E. F. Ketcham, Colonel, Corps of Engineers
Deputy Service Command Engineer"

XIII.

Fair market value at date of taking denied.

The court erred in prohibiting the witness, A. L. Jacobberger (II, 273-9), from giving the fair, reasonable market value of the property on November 21, 1942 (II, 312).

"Mr. Hotz: I am asking for the fair and reasonable market value of that property as described in this real estate description (from petition).

* * *

(II, 313) The Court: That is the question the jury is to determine, and that is the value that we are trying to get now. They did not take your property. They took the use of your property.

Mr. Hotz: They have to start out with a valuation of some sort.

The Court: The valuation is the valuation of the use. We showed the value of the property, or thought we did, through the testimony.

Mr. Hotz: We have a lot of things here and I want to get the owner's value of the property.

The Court: Objection sustained. Try it again.

Q. What is the fair and reasonable value of all of the property down there at the Kimball Laundry Company, on November 22, 1942, when it was taken over by the government?

The Court: You mean the fee title; the title to all of it?

Mr. Hotz: The whole business, as he saw it down there—the whole thing as an operating company down there at that time.

The Court: Not as an operating company. You can show, and I have permitted you to show the value of the property that was used. If you want to sum it up with him in total, round figures, do that, but beyond that you will not be permitted to go properly. Do you understand what I mean, Mr. Witness? A. I understand what you mean, but I can't answer this question—

Mr. Murphy: You said you couldn't answer that question, isn't that true?

A. I can answer the question he asked me, yes.

The Court: Suppose you tell me what you value all that property at, at the time they took the use of it away from you; that is, the real estate and the machinery and everything in the building. What do you consider the fair market value of that property?

A. Of the Kimball Laundry Company?

The Court: Kimball Laundry Company; that is, the building and the machinery, aside from your trucks and your routes and your good will, and all that sort of thing (II, 314). We are asking you simply for the fair market value of the property in anybody's possession.

Mr. Murphy: May I suggest that the question be limited to the physical property?

The Court: I thought I did that."

The court stated (II, 315):

"The Court: Let the record show that in response to the request of Mr. Hotz, the court listened to counsel on arguments of the lawyers for a matter of half an hour and now reconvening, you may present your question and get a ruling upon it, Mr. Hotz.

Q. What do you consider the fair and reasonable market value of the Kimball Laundry Company at the time of the taking, exclusive of the delivery trucks, exclusive of good will, and exclusive of loss of business?

A. $987,000.00.

Mr. Murphy: Just a moment.

The Court: Strike the answer and the jury will disregard it.

Mr. Murphy: Petitioner objects as incompetent, irrelevant and immaterial; not within the issues of this case; the question being the value of the Kimball Laundry Company.

The Court: That will be sustained.

Mr. Hotz: We offer to prove by the witness that the value of the Kimball Laundry Company on November 22, 1942, was $987,524.32, exclusive of the delivery trucks, exclusive of any element of good will, and exclusive of the loss of profits, and that this item was made up of the fair and reasonable market value of the building, of the machinery therein, the power plant and customers routes of this particular laundry, which had been (II, 316) built up over a period of ten years from $275,000.00 to $400,000.00 of gross income in ten years, and that these customers routes consisted of those shown on Exhibits 10, 11 and 12; and that these routes were inhered in that property as a part inseparable therefrom, and that they were destroyed in the taking. Further itemizing this figure, the witness will testify, comes about through $280,348.00 of the value of the building; machinery and equipment therein at $273,831.39; power equipment and incidental installations connected therewith, $62,928.08; land, $30,000.00; and as a capital asset, the trade routes evaluated by numbers of customers of different kinds, $340,516.85; that the purpose of the

testimony is to show the difference in the value at the time of the taking and at this time, and that in the return of said property there is only left in actual value as of this time to the Kimball Laundry Company $426,208.28, and that the proper measure of damages is the difference between said two, of $561,316.04; that there exists no accurate measure of evaluating these properties other than a showing, and that these are all in accordance with accepted principles of accounting in the laundry business.

Mr. Murphy: Petitioner objects to the offer for the same reasons as to the question.

The Court: Will you inform me, does the offer follow the discussion we have just had and present the questions for the record that were raised by his offer and by your objections thereto?

Mr. Murphy: I think it does. I think the offer is perhaps a little broader, going more into detail, but involving exactly the point in issue.

The Court: Is that so, Mr. Hotz?

Mr. Hotz: Yes, sir.

The Court: With that assurance of counsel, the court will not take time to have the offer read. Following the rule heretofore made, the offer is refused and objection thereto is sustained."

At this point in the proceedings at the trial, this valuation, exclusive of good will and loss of business, was material, and it constituted prejudicial error to have it stricken and the witness, A. L. Jacobberger, an officer, denied the right to answer.

XIV.

The evidence of A. L. Jacobberger of value of "use" also stricken.

The court erred at the close of the testimony of A. L. Jacobberger (II, 367) in effect sustaining the motion of counsel for the government to strike all the testimony of A. L. Jacobberger in reference to the witness's opinion of the fair, reasonable market value for the use of the premises from November 22, 1942, to June 30, 1946, to be $570,000.

(II, 317) "Q. Do you understand we want now your figures that you consider agreeable for the temporary use of this property up to June 30, 1946, and I might say, do not include in that anything in reference to trade routes or loss of profits, because the court has passed upon that. Get your (II, 318) figure down to something you can explain, after you give it.

. . .

The Court: That is the fair market value of the use of the property as of November 22, 1942, through June 30, 1946, or three years, seven months, eight days; together with the damage which has been enumerated by the witness, added thereto, so that you may state it in one item. Is that what you are requesting, Mr. Murphy? Is that right?

Mr. Murphy: Yes.

Mr. Hotz: Yes.

. . .

A. That is exclusive of these other things—a total of $570,000.00."

On cross-examination from II, 319-65, the witness Jacobberger justified his figures. Nevertheless, at the close of his testimony, the court made the following comment (II, 365), which carried the matter of admissibility to the instructions, where the court definitely stated to

the jury there was no evidence of the value of the use by anyone (Instructions supra, pp. 34-41).

(II, 365) "Mr. Murphy: Petitioner now moves the Court to strike from the record the testimony of the witness A. L. Jacobberger to the effect that in his opinion the value of the use of the premises here involved for the period from November 22, 1942, to June 30, 1946, is the sum of $570,000.00, for the reason that said figure under the testimony of said witness constitutes and comprises and is made up of certain figures and factors not recoverable herein and not constituting items of just compensation, nor evidence of just compensation, and which said (II, 366) figures and factors are incompetent and immaterial and constitute in some instances purely business items and in other instances constitute duplication of other figures and factors likewise included in said total figure.

Petitioner moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value of $570,000.00 in the testimony of this witness, A. L. Jacobberger the sum of $16,400.00 identified by said witness as covering costs of storage of trucks and other items not involved in this action, and also including business expenses of audits and appraisals in connection with this action and not constituting compensable items in this action.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 in the testimony of this witness, A. L. Jacobberger and to entirely disregard the item of $50,000.00 to $75,000.00 constituting a part thereof as testified by said witness, and which said sum comprises, speculative business expense items anticipated as possibly arising at some future date and entirely

after the period of possession of these premises by petitioner.

Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 in the testimony of this witness, A. L. Jacobberger, and to further disregard the item and sum of $11,327.00, constituting depreciation on the power plant, for the reason that said item and figure constitutes a duplication of and is also included in the claim of damage to said power plant in the sum of $32,667.55, as shown by Exhibit No. 23, and constituting the full difference in value of said power plant as of the time of taking and as of the present date, and which last mentioned figure includes all depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

(II, 366) Petitioner further moves the Court to strike from the evidence and to instruct the jury to deduct from the gross figure of use value in the sum of $570,000.00 from the testimony of this witness, A. L. Jacobberger, and to entirely disregard the further sum of $65,098.00, constituting claim of depreciation to that extent on the laundry machinery here involved, for the reason that said last mentioned sum constitutes a duplication and is included and covered by the figure and claim of $153,131.54, constituting the difference in value according to respondent's own witnesses of the said laundry machinery between the date of taking and the present time, and which last mentioned figure includes all items of depreciation and said item on the testimony of the witness constitutes a business accounting deduction and a profit to the business.

The Court: I will instruct the jury with reference to these items when the proper time comes. The record will show the same ruling."

Later instruction of the court and the sustaining of the motion to strike the testimony of the witness, A. L. Jacobberger, on II, 315; 367, constituted reversible error (supra, pp. 34-39; 64-70).

XV.

The witness Judd denied right to prove $340,516.85 as the value of the trade routes as part of the damage.

The court erred in striking the testimony of the witness, Harry E. Judd, a certified public accountant, of Omaha, Nebraska, for 22 years, identified with a responsible firm, a law school graduate in 1924, and an expert in laundry valuations in which he had specialized in the course of his audits and examinations.

Exhibit 14 (refused; II, 370) identified by the witness and compiled by him, gave the trade's valuation of $20. for each of the 15,093 trade route customers; 50c each for the 4,648 pillow customers; 50c each for the 6,810 table linen customers; 50c each for the 5,814 rug and blanket customers; 50 each for the 8,178 lace curtain customers; $10 each for the 1,500 call customers; and for the 44 commercial customers producing $34,253.13 revenue for 47 weeks during 1942 equals $728.79 per week at 15 times that amount when summed together in accordance with Ex. 14 (II, 370) gave the total value of the customers served at $340.516.85. This exhibit was prepared by the witness Judd from the data on the books and records of the Kimball Laundry Co. and in accordance with trade practice. (Adopted by the U. S. Tax Court as a proper method of evaluating of laundry routes.) Objection was made and sustained by the court (II, 368):

(II, 369) "Mr. Hotz: We offer to prove by the witness the contents of Exhibit 14 and the conclusions therein to be in reference to the standard method used by laundries in evaluating customers and trade routes, and the witness also will testify that the same has been used and adopted in the case of Metropolitan Laundry Company before the United States Board of Tax Appeals, Volume 2, U. S. B. T. A., Page 1062, and more particularly Page 1066; and also in the case of Pioneer Laundry Company found in Volume 5, U. S. B. T. A., in the case of Pioneer Laundry Company vs. Commissioner of Internal Revenue, and especially on Page 822.

The Court: What is it you are referring to in the law book?

Mr. Hotz: It is the similar method that had been adopted in laundry evaluation cases before the United States Board of Tax Appeals.

Mr. Murphy: Petitioner objects to the offer for the same reason as to the question, and for the further reason the offer is broader than the question and calls for a legal conclusion of the witness.

The Court: Objection sustained."

The Kimball Laundry Co. was not a merchandising establishment that had goods and wares to sell to customers. It was a servicing organization exclusively depending upon its established routes for plant valuation.

XVI.

The evidence of the cost per year for three years to reestablish routes destroyed, was denied.

The same witness Judd prepared three additional exhibits on the subject matter of expense to re-establish routes, Exhibits 15 (II, 327-5), 16 (II, 376-9), and 17 (II,

380-3). These exhibits gave the estimated gross income and operating expenses, taken from the condemnee's records and compiled by and with the assistance of Harry A. Jacobberger and A. L. Jacobberger. The net total expense after credit from income was first year, $151,680 (II, 373); second year, $130,366.80 (II, 377); and third year, $130,483.20 (II, 380).

(II, 368) "Mr. Murphy: Objected to by petitioner as incompetent, irrelevant and immaterial, for the reason it is not evidence of the fair market value or fair use value of the porperty taken, and not relating to any issue in this case, and is evidence relating solely to the skill and management, and to matters of the business operations, profits and loss of profits.

"The Court: The objection is sustained."

In each instance the offer was made:

(II, 371) "Mr. Hotz: We offer to prove by this witness the contents of Exhibits 15, 16 and 17, and to prove through the witness the facts set forth in the exhibits.

"Mr. Murphy: Same objection to the offer as to the exhibits and for the further reason that the exhibits themselves are the best evidence of what they would prove.

"The Court: Sustained and offer denied."

Thus, two methods were offered by the witness to prove by nothing speculative or indefinite the value of a laundry's trade routes in the business world.

In view of the instructions given by the court to the jury later and the ruling out of this evidence, prejudicial reversible error resulted.

XVII.

The testimony of the president, Harry A. Jacobberger on fair market value of the plant, and his description of it, were nullified by the court.

The testimony of Harry A. Jacobberger, the president of the Kimball Laundry Co., a resident of the city for more than 50 years and in the laundry business since 1912, gave the history of the organization and the excellent condition of the plant in November, 1942.

(II, 389) "Q. Just explain, in a few instances, what you meant by that when you talked about replacements and repairs and upkeep being in first-class condition. Just give us a short graphic view of what you were talking about, so that we will know.

Mr. Murphy: Objected to as incompetent, irrelevant and immaterial and adding nothing to the statement already made that it was in first-class condition and as good as new.

The Court: Sustained."

The court erred in limiting the witness because of this particular witness's ability. The witness was asked (II, 388):

"Q. What I do want to ask of you, however, is the method that was adopted by you, as president of this organization, as to the condition of the machinery and equipment, and the building, and boilers, and power plant, and all, as it existed on November 22, 1942. My object in asking the question is to get the condition, the present condition of operability of that machinery at that time and that building at that time; what was its condition and upkeep as to rehabilitation, replacement, and so forth. Will you answer, please?"

The witness, Harry A. Jacobberger, gave a description of the building and contents (II, 396-7). He concluded by saying (II, 401):

> "A. The Kimball Laundry Company, in this area, and when I say 'this area' I mean west of Chicago, and I say clear to the Pacific coast, is considered the outstanding model plant. I know it is the practice of most of the machinery salesmen to bring their prospects anywhere in this territory to see the machines they want to sell in operation in our plant. We are considered a model plant by practically every laundry owner, even in Chicago, St. Louis and Kansas City, and places of that type. In fact, they used to say they thought I was crazy for keeping up a plant of that type, sort of a show-room plant. It was my hobby. I enjoyed it.
>
> "Mr. Murphy: I move to strike what he thinks it was. It is calling for a conclusion.
>
> "The Court: That is very true, but I don't know that it is damaging or not on either side. It is just a comment. It is pretty hard to separate that which is comment and proper. Overruled. Let it stand."

The court erred in making this comment. It inferred that there was no positive value to Harry A. Jacobberger's estimate of the type and kind of the plant it was. Later in the court's instructions, the president's evidence was nullified by the court's stating there was no evidence upon which the jury could arrive at "use" value (Inst. supra, pp. 34-41).

XVIII.

Testimony of the president on "use value" asked by the court, was nullified by the court.

The court erred, after requiring by rule of court that the testimony be confined to temporary use, in ruling out the testimony of the witness, Harry A. Jacobberger, on that matter.

(II, 421) "Q. What would you say was the fair value in the city of Omaha on November 22, 1942, of a temporary use that would be made of the Kimball Laundry Company including the land, building, machinery and equipment for a term that would be put to you at that time of three and one-half years, or three years and six-tenths months; that is, a term for temporary use for the whole thing as it was as a unit, for the use of the United States Government, let's say, or any similar person that had necessity for an immediate use?

* * *

(II, 422) "Mr. Murphy: Objected to as incompetent, irrelevant and immaterial, for the reason that it is not evidence of the fair market value or fair rental value or the use value of the property taken and is not related to any issue in this case; is evidence related to the management, to the operation of the business, to the loss of profits, good will and customs.

"Question read.

"The Court: Objection sustained. It is not the proper measure of damages. * * *"

The petition was then read to the witness with this explanation by counsel (II, 423):

"Mr. Hotz: In asking this question to this witness, I am doing it in the light of the rulings of the court that have heretofore been made, that has been excluded, and I think I have explained to the witness so that he won't be complicated with that.

"The Court: What is the occasion for this explanation?

"Mr. Hotz: I don't want the witness to be misunderstood, as Mr. Murphy is, that I am trying to include something that is more than the land, building, machinery and equipment.

"The Court: Why get it so complicated? We are trying to find out what his opinion is of the use of the property that was taken, as described in the petition. What further explanation is necessary? You may answer the question, if you understand it.

"The Witness: I am not sure. You want the entire value of the property?

"The Court: Yes, value for the use of the property for these three years, seven months and eight days, on the 22nd day of November, 1942. Its value as of that date. A. In my judgment that woould be about $600,000.00."

This evidence in the witness's cross-examination explained (II, 423-5) how he arrived at the amount given, and also on direct examination as a basis for his estimates for the term "use" (II, 396-423). At II, 440, counsel for the government stated:

(II, 440) "Mr. Murphy: At this time petitioner moves the court to strike from the record and to instruct the jury to entirely disregard the testimony of this witness Harry A. Jacobberger as to the rental or use value of the property in question at $100,000.00 a year, a total of $360,000.00, for the reason that said [illegible] and figure, according to the testimony of the witness himself, is based upon and is his opinion of the value to the Kimball Laundry Company of this property as a going concern, and is therefore not a proper measure of damages and not within the issues of this case."

"The Court: Objection overruled, because the testimony, part of it is competent and other matters are incompetent. The court expects, at a later time, to instruct the jury to disregard all testimony pertaining to consequential damages, anything personal to the owner or the owners, and confine their verdict to the property and matters incident thereto. I have so announced at different times. The rule I am administering is pretty well understood. I hope you will confine it within that scope, but we have not been able to, and I will have to deal with it when I come to instruct the jury finally in this case. I announce this rule in advance at this time so that counsel may be advised to spend no time on any of these matters that I have referred to as not being elements of damages coverable in this action, so that you will not be in any way prejudiced by it or taken in any way by surprise.

(441) "Mr. Hotz: I would like to put Mr. Harry Jacobberger on the stand for a moment.

"The Court: Have him come forward."

On redirect examination of Harry A. Jacobberger, the following took place:

(II, 441) "Q. You have heard the colloquy and statement of the court. I will put this question to you, and if you wish to change your testimony, you are privileged to do so. What did you take into consideration when you made the statement in response to the counsel's inquiry or question upon which to base the $100,000.00 per year for the use and the damage, in addition to $220,000.00, to make the $580,000.00 that counsel was talking about when he was cross-examining you? If you want to change your testimony in that regard, or offer any explanation, you may do so.

"Mr. Murphy: Objected to for the same reason as the original question. It is an exact repetition of

the original (II, 442) question, with two or three others involved in it, and indefinite and uncertain.

"The Court: That will be sustained and the court will try to help him out. What did you mean when you said in answer to Mr. Murphy's question that you valued the use of the property as a going concern? What are the elements you had in mind?

"A. I had in mind that if someone came to me and wanted to lease the property for a matter of two or three years, that is what it would cost. That is the consideration.

"The Court: That is, you mean to take over your entire laundry business?

"A. Take over the physical plant and start to operate where we left off.

"Q. Did you mean taking into consideration the customers routes and the trade?

Mr. Murphy: Same objection.

"The Court: Sustained.

"Q. Did you mean physical assets alone?

"Mr. Murphy: Objected to for the same reason and repetition and improper redirect.

"The Court: That will be sustained.

"Q. I will ask you once more whether or not in your statement to Mr. Murphy, whether you meant the rental of the physical assets for the period of three and one-half years?

"The Court: That will not be permitted. It is for the jury to determine what he meant by his testimony. He has repeated it several times. If he wishes to make any change in any of these statements he has made, or if he wishes to withdraw any statement he has made he can do so, but you cannot proceed in this way longer.

"Q. Do you wish to withdraw or change your testimony in that respect?

"A. I didn't know there was going to be any misunderstanding about my statement.

"Mr. Murphy: I move to strike that and ask the witness answer that simple question 'yes' or 'no.'

"The Court: Sustained.

(H, 443) "Q. If you wish to change and withdraw your statement you made as a going business, that is the thing we are getting at. You made the statement, 'As a going concern.'

"The Court: In order to be fair to the witness—we seem to have got him confused. Maybe I have. To be fair to the witness, you may state again, Mr. Jacobberger, what are the elements that you considered as making up your opinion, or arriving at your opinion that the fair and reasonable market value of the use of the building, the machinery and the ground, on the 22nd day of November, 1942, for a term of three years, seven months and eight days was the sum of $100,000.00 per year. Tell us again so there will be no mistake about it.

"A. That is exactly what I meant with reference to the building, ground, equipment and all of the things we had to go with the business over there, to be worth the sum of $100,000.00.

"The Court: What do you mean by 'the business'?

"A. There are a lot of things we haven't enumerated. We have store rooms, cold storage, which is part of the business.

"The Court: We will proceed with the matter no farther.

"Mr. Hotz: That is all.

"Mr. Murphy: That is all. (Witness excused.)" (See Court's Inst. supra, pp. 34-41; Requested, pp. 41-45.)

XIX.

The rejection of evidence of the president of condemnee that it was unable to start business elsewhere and was put out of business entirely by the taking, was error.

The following took place at H, 437-9:

"Q. When this laundry was taken over by the government in 1942, did the Kimball Laundry Company have available to it in the laundry another space where it might have moved?

"Mr. Murphy: Objected to as incompetent and immaterial.

"The Court: Sustained.

(H, 438) "Q. Did the Kimball Laundry Company remain in business after November 22, 1942?

"Mr. Murphy: That is also objected to as incompetent and immaterial.

"The Court: That will be sustained.

"Q. Was the Kimball Laundry able to remain in business after November 22, 1942?

"Mr. Murphy: Objected to as incompetent and immaterial and further, it is an improper question.

"The Court: Sustained.

"Q. Was the Kimball Laundry Company business as a going concern destroyed by the taking on November 22, 1942?

"Mr. Murphy: Objected to as incompetent and irrelevant and not within the issues in this case and having been already ruled on by the court two or three times.

"The Court: That will be sustained and you will not continue that further. You made your record now sufficient, Mr. Hotz.

"Mr. Hotz: I want to read in the offer.

"The Court: That isn't necessary.

"Mr. Hotz: I have always thought so. We offer to prove by this witness, if he were allowed to answer the questions propounded to him, that the Kimball Laundry Company, at the time of the taking was completely driven out of business by the taking.

"Mr. Murphy: Same objection to the offer as to the question, and for the further reason the offer is broader than the question.

"The Court: Sustained. The offer will be denied.

"Mr. Hotz: This offer goes to all four of the last questions propounded to the witness and upon which the court ruled that the witness might not answer.

"Mr. Murphy: Same objection to the amended offer.

"The Court: Sustained. Offer denied.

"Mr. Hotz: Is it customarry to have the exceptions noted of counsel? Are they put in the record?

"The Court: Which counsel?

"Mr. Hotz: Ours.

(II, 439) "The Court: Your exception?

"Mr. Hotz: Yes.

"The Court: They are noted as a matter of course. Under the ruling on everything adverse, you get an exception to, as a matter of course."

XX.

The testimony of Fred Jacobberger, an officer and qualified expert, was nullified by the court's instructions to the jury that there was no evidence of the value of the "use."

The court erred in ruling out the effect of the testimony of Harry Fred Jacobberger, an officer and one of the principal stockholders in the Kimball Laundry Co. He was 33 years of age and at the time of trial was a major in the Quartermaster Corps (II, 443). He was well educated, and was the officer in charge of the Quartermaster laundry at Jefferson Barracks for 2½ years, and the officer in charge of the Quartermaster laundry and dry cleaning plant at Camp Carson, Colorado, for 18 months. After fully qualifying as an expert and being thoroughly familiar with the Kimball Laundry Co. property (II, 443-54), the witness was asked:

(II, 454) "Q. Knowing the Kimball Laundry Company as you do and without taking into consideration anything but the physical assets; that is, the building, machinery and power plant and equipment, what would you say would be the fair sum for the Kimball Laundry Company to receive for the temporary use of that property for a period of three years, seven months and eight days? That is, from November 22, 1942, in the shape it was then?

"The Court: Through June, 1946. From that date, what would that value be as of the 22nd day of November, 1942? A. About $570,000.00.

"Q. That would include the work to rehabilitate and fix up the plant?

"A. Yes, that includes now the restoration of the building, grounds and equipment and power

equipment in the condition it was when it was taken over.

"Q. In other words, to bring it back to where it was in November, 1942?

"A. Yes, and pay us for the temporary use of it.

"Q. You were in charge, I think you said of sales of the Kimball Laundry Company while you were there? A. Yes.

"What did that mean?

(H, 455) "A. I had charge of route men, supervisors. I arranged for the advertising. I arranged price structures in conjunction with Al, and in his absence supervised the production operations of the plant, in return for which, in my absence he supervised the operation of the sales department.

"Q. In this figure you gave $570,000.00, do you include any loss of customers, routes, loss of business, or good will? A. I did not."

This testimony, while permitted at the time, was nullified when the court stated to the jury and so instructed them that there was no evidence of the fair value of the use of this property as condemned (Inst. supra, pp. 34-41).

XXI.

The court denied the witness, Fred Jacobberger, formerly in charge of the trade routes, the right to confirm the accuracy of Exs. 14, 15, 16, and 17.

The court erred in ruling out the testimony of the witness, Fred Jacobberger, to verify the accuracy of Exhibits 14, 15, 16, and 17 (II, 455).

(II, 456) "Mr. Hotz: The accuracy of them. I want him to verify the accuracy of them."

"Mr. Murphy: Objected to as incompetent and immaterial.

"The Court: No one is questioning the accuracy.

"Mr. Hotz: I don't know.

"The Court: I am telling you they are not.

"Mr. Hotz: Very well. These exhibits were excluded and I want to make an offer of proof from this witness.

"The Court: You have already made the offer of proof.

"Mr. Hotz: But not from this witness.

"The Court: It doesn't matter. You have already made the offer of proof, and for the purpose of your offer, they are accepted to be what they purport to be. There is nothing more this witness can add.

"Mr. Hotz: We are referring now to Exhibits 14, 15, 16 aand 17 (II, Judd, 372-383)—

"The Court: And let the record show any further offer of these exhibits will not be permitted and counsel will desist from proceeding in this way."

XXII.

Error by denying 6% interest from date of taking.

The court erred in denying interest at 6%

(a) on $34,875.00 for supplies taken by the government on November 22, 1942, paid July 8, 1943;

(b) on $297,776.93 (the judgment) from November 22, 1942, to April 9, 1946, the date of judgment, less credits on the amounts paid into the Registry of the Court;

(c) on $45,776.03 extraordinary damages from November 22, 1942 to April 9, 1946. No interest was allowed on this item.

[Answer, I, 26(XI); petition in error (I, 51 (2)); petition on appeal (I, 91-5(XI)), stricken (II, 183); motion for new trial re interest (I, 107-8); judgment (I, 103-7); motion in arrest of judgment (I, 97-100).]

XXIII.

Petitioner's expense before appraisers erroneously denied.

The court erred in denying (I, 40) petitioner's motion to allow as damages $3,153.97 expenses incurred to conform to demand to appear before appraisers with audits and expert witnesses to explain to the appraisers information which they required. No court costs were included. [Itemized and explained in I, 41-3; overruled at beginning of trial, II, 183; motion for new trial, I, 108(5), overruled August 16, 1946 (I, 140).]

(These items of cost to petitioner should follow the final judgment.)

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The petitioner, Kimball Laundry Co., rested (II, 460).

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XXIV.

The government proceeded (III, 461).

The court erred in receiving exhibits of the government, identified by the witnesses Moister (III, 461-473) and the government clerk Hergert (III, 473-478), because the testimony went solely to the question of the amount

paid in dollars and cents for upkeep and repairs compiled from government invoices (Exs. 2, 3, 4, 5, 6, 7, 8; III, 462, 464, 466, 477-8, 506). The witnesses had no knowledge whether the work or repairs were made. Also the court excluded petitioner's Exhibit 6, p. 7 (II, 218), showing its repairs and maintenance for comparison. Objection (III, 504) was made that the exhibits were only a part of the government's accounting system, not showing which were capital expenditures and which for maintenance and which for repairs. The objection was overruled and exhibits received (III, 505-7).

XXV

Error of court in permitting the government witnesses to speculate on cost to place the laundry in good state of repair, the government knowing at the time that no repairs were to be attempted by the government (laundry abandoned after trial, I, 97).

The court erred in receiving Exhibits 10, 11, and 12 (III, 557-67) and the testimony of the witnesses, Denton J. LaTurner (III, 546) and Ross J. Newcom (III, 571), because those men were machinists and repairmen who estimated that it would cost $5,021.87 in parts; $3,917.51 in labor; and $2,729.35 to relocate the machinery to its original place in the plant, or a total of $11,668.73 to place the machinery in good repair. The witnesses admitted that neither was stating that his estimate would place the machinery and equipment specified by him in the condition that it was in November, 1942. Neither had seen the property at that time. They had both made their guess at what it would cost to

place the machinery and equipment in operable condition (III, 568, cross by Mr. Hotz of Mr. LaTurner):

"Q. You don't undertake to estimate the value of that machinery and the condition of the machines as they were when they were taken over by the government in 1942? A. No."

Mr. Newcom stated (III, 573, cross by Mr. Hotz):

"Q. In making these observations that you have made as to the conclusions you have drawn and figures you have given, you have made no attempt, have you, to evaluate those machines as they were in 1942?

A. No, sir.

Q. As a matter of fact, you didn't know what condition they were in then? A. Absolutely not.

Q. You haven't attempted in any of the work that you have done, as manifested now and shown in Exhibits 10, 11 and 12, to give any valuations?

A. No, sir."

The court erred in overruling petitioner's objections to government Exhibits 10, 11, and 12 (III, 555, 556):

(III, 555) "Mr. Hotz: Object to the exhibits as self-serving declarations of the witness; not the best evidence; not tending to prove any issues in the case; merely a matter of a compilation of repairs; the witness not showing himself to have examined these machines and equipment in 1942 when they were taken over, and yet, proposes, by the statement that he made, to say he could put them back where they were in 1942.

The Court: That isn't what he said. What he said was that with this money he would put all this

machinery in good workmanship condition, good operating condition. Go back and get the question."

(III, 556) "Mr. Hotz: It is the same objection to Exhibit 11 as to the three exhibits, and we will make these objections to each one of these exhibits. They are made up on forms to be filled out and the witness not having shown himself qualified to give the conclusions that the exhibit calls for, such as restoration, and that applies to all three of the exhibits.

The Court: The court adheres to its former rulings and overrules the objections and receives the exhibits in evidence."

The court erred in the admission of the exhibits, because the witness LaTurner had stated in direct examination (III, 555):

"Mr. Murphy: The Government at this time offers in evidence Government's Exhibits 10, 11 and 12 (III, 557-67).

"Mr. Hotz: May I ask the witness a question or two?

The Court: Very well.

Mr. Hotz: Q. Did I understand that you stated that this would place this machinery in the condition it was when it was taken over by the Government in 1942?

A. That is right.

Mr. Hotz: Q. Were you here in 1942?

Mr. Murphy: Objected to as not proper cross-examination for the purpose stated.

The Court: That will be sustained. Are you objecting to the exhibits?

Mr. Hotz: Yes."

Then follows acceptance of the exhibits as above ruled. Restoration to former condition, and repairs to place in good condition are different matters.

XXVI.

Government witness, C. R. Crowder.

The court erred in receiving the evidence of C. R. Crowder, a government employee (III, 609-760) and the exhibits compiled by him consisting of the witness's estimate of repairing the building, floors, boilers, heating plant, laundry machinery and equipment, dry cleaning equipment, power plant, electrical devices, and all else shown on Exhibits 17 (III, 636-40), 18 (III, 642-45), 12A and 12B (III, 647), and 21 (III, 649-55), to which the following objection was made (III, 634-5):

> "Mr. Hotz: Exhibit 17 is compiled by the witness, or was compiled by the witness, according to his testimony, and it takes in repairs to the building and repairs to the power equipment, such as heating, plumbing, boilers, stokers, and it takes in resurfacing and waterproofing the floors and rehabilitation of the buildings, including terra cotta, concrete work, and painting and structural steel work and elevators, and the witness not having shown himself qualified to have made the estimates thereon; and for the further reason that he is testifying in the capacity of an architect or an engineer who bases the conclusions arrived at, according to his statements, from information that he has received in the most part from others and not accompanied by any bids or binding arrangements with any of the contractors with whom he has talked or obtained his information. That is for Exhibit 17.
>
> The Court: Overruled."

The same objection and erroneous ruling was made for each of Exhibits 18 (III, 641), 12A and 12B (III, 646), and 21 (III, 648).

The witness Crowder went about town gathering information here and there orally, and admitted making his exhibits largely from what persons told him about the costs, shown on the exhibits. His qualifications (III, 656-90) show no laundry experience whatever and that he was an assistant to the engineering staff of the army engineer at Omaha and knew nothing of the laundry in 1942 (III, 666):

> "Q. Then, as I understand it, you did not have any written bids? A. No."

The court erred in ruling on the appellant's objection to government's Exhibit 21 (III, 648) and Exhibit 17 (III, 636-41) by stating in the presence of the jury that those sheets made up by the witness Crowder consisting of an enormous exhibit of 594 items (found original record IV, 1116), and consisting generally of government's Exhibits 17, 18, 12A and 12B (III, 647), and 21 (III, 649-55), admittedly chiefly obtained from oral statements (III, 665-90), were government documents and were considered by the jury (III, 648):

> "The Court: The court has heretofore expressed his opinion of the qualifications of the witness. In addition, my recollection of his testimony is that these are official reports and may be treated and hereafter used as official reports and are made up for that purpose and as such might be in the nature of official documents. Overruled."

The exhibits were gotten up for evidence in the case at bar, because the government was not to repair or re-

store; it was to abandon when declared surplus (I, 97).

These exhibits so admitted were no evidence of damages to the machinery and equipment that existed in the plant at the time of its abandonment (I, 97), but were the unqualified witness's compilation obtained from all sources as to what different persons thought it would cost to place the entire plant in running operation and to restore it. He placed $37,521.34 (III, 640) under the heading of "Restoration to First Class Condition."

The objections to government's Exhibit 18 (III, 642-5) were similarly (III, 648) overruled, and error was committed for the same reasons as above set forth on this witness's other exhibits above described (supra 90-91).

XXVII.

Errors in the admission of evidence and the instructions in the testimony of the government witness, Cornelius G. Weber (III, 721-57).

The court erred in admitting the testimony of the professional appraiser for the government, Cornelius G. Weber, of Milwaukee, of the American Appraisal Co. He made his appraisal in August, 1944 (III, 723) and did not see or appraise the property in 1942. Consequently, the following questions and rulings are in error (III, 728, 729):

> (III, 728) "Q. As a result of your survey, investigation and work which you have detailed, did you arrive at a fair and reasonable value of the entire physical plant; that is, the land, building and power plant and equipment involved here, as of November 22, 1942? A. I have.

Q. What in your opinion was that fair and reasonable value of that entire plant as of that date?

Mr. Hotz: Just a minute. I think you testified you were not here in 1942 and did not see the plant until 1944."

(III, 727) "Q. That is not the Government's Exhibit 19, is it?

A. No.

Mr. Hotz: That we object to the question upon the grounds that the witness has not shown himself qualified, not having seen the property in 1942.

The Court: Overruled."

The witness was permitted to state, although admittedly not a laundryman, that the total fair value of the property taken in 1942 was $455,000, broken down into building, land, machinery, and equipment. The following question was asked by the government's counsel:

(III, 729) "Q. What in your opinion was the reasonable, fair, annual use or rental value of the property we have described—first, give me your total annual rental and we will break it down later?

Mr. Hotz: Objected to as the witness not having shown himself qualified to answer; incompetent; not showing that he has had any experience whatever in rentals, and especially of property of this sort and of laundries; not showing that there ever has been a laundry rented at all to anybody, excepting on a temporary use in a condemnation proceedings, perhaps.

The Court: Overruled."

(III, 735) "Mr. Murphy: Government at this time offers in evidence Exhibit 22.

Mr. Hotz: Object to it as incompetent, irrelevant, and immaterial; not the proper method in arriving at just compensation in a condemnation suit.

The Court: Overruled."

The witness's exhibit showed interest based on his values as "fair rental value," arriving at $70,000 per year, or $252,000 for the 3.6 years, exactly as the jury returned (I, 96(2)), and as the court virtually instructed (I, 159) the jury to find. The Court:

"* * * Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it whenever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here. * * *"

The jury accordingly found exactly as the government's Exhibit 22, prepared by the witness Weber, disclosed (III, 736).

The valuations prepared by the witness, being government's Exhibit 23 (III, 751-7, 752) gives the witness's cost of reproduction, less depreciation as fair market value, of $454,231.77, rather than the fair market value in the market.

(III, 750) "Mr. Murphy: Petitioner offers in evidence Government's Exhibit 23. You have a copy on your desk, counsel.

Mr. Hotz: We object to Exhibit 23 for the reason that the witness has not shown himself qualified to answer; he has not shown himself qualified to give the valuation of a laundry and the machinery and equipment therein on November 22, 1942; for the further reason he did not see the property in 1942, November of 1942; that the test is the fair market

value of that property on November of 1942, and the method arrived at by the witness is incompetent as a method of arriving at valuation.

The Court: His testimony has long since gone into the record. This is merely a notation or summation of the facts and figures that he has testified to and is offered merely for that purpose. It is merely offered for the use of counsel on both sides of the case, and the Court and jury. Objection overruled."

Applying the errors relied upon for reversal regarding the entire instructions of the court (I, 150-61, 167) and those requested by the petitioner (I, 172-8) and the refusal to give them, and the exceptions noted (I, 165-7), when applied to the testimony of the government witness Weber, presents the error in the admission of his exhibits (supra 93-94).

XXVIII.

The court's error in admitting the testimony of the witness, Lewis C. Shiles, a real estate man who became an appraiser for the government (III, 760-801) *both because he lacked qualifications and his methods were erroneously sanctioned by the court.*

(III, 767) "Q. What in your opinion was the fair and reasonable value of the land involved and upon which the Kimball building is situated, as of November 22, 1942? A. $17,600.00.

Q. And in all of these questions, at the moment at least, I am referring to the same date, November 22, 1942, and the premises involved in this action, the Kimball Laundry matter. A. I understand.

Q. What in your opinion was the fair and reasonable value of the building as of that date?"

(III, 768) Mr. Hotz: Objected to, witness not having shown himself competent to give an appraisal of the building.

The Court: Overruled.

A. $190,000.00

Q. And what in your opinion was the fair and reasonable value of the power plant, including the items you have under power plant?

Mr. Hotz: (Objected to), the witness not having shown himself competent to judge values of the power plant.

The Court: Overruled.

A. $12,500.00."

The witness then proceeded to give restoration values without having shown himself qualified.

(III, 768) "Q. What in your opinion was the fair and reasonable value of the machinery and equipment, including all machinery and equipment, everything down there that has not been included in the first three items, as of the same date?

Mr. Hotz: Objected to as the witness not having shown himself qualified to know the value of laundry machinery and equipment installed.

The Court: Overruled.

A. $213,400.00.

Q. What in your opinion was the fair and reasonable value of the entire physical plant, including land, building, power plant, machinery and equipment, as it stood there, complete, on the 22nd day of November, 1942?

A. $433,500.00.

Q. Did you also appraise and determine what in your opinion was the fair annual rental value of that property at that time? A. Yes.

Mr. Hotz: Objected to as incompetent, irrelevant and immaterial; not a proper method of arriving at a temporary use, and the witness not having shown himself competent to judge the value of a laundry.

(III, 769) The Court: Overruled."

(III, 775) "Q. Is this, in your opinion, a fair and reasonable amount, except for that one possible item of some removing and relocating some of the machinery in there, does this sum of $253,066.80, in your opinion, constitute the fair and reasonable and the total fair and reasonable value of the use of this property over the term stated, including all restoration and renovating costs?

Mr. Hotz: Respondent objects to the question upon the grounds that the witness has not shown himself qualified to answer; therefore, incompetent; that he proposes to arrive at figures of valuation in a manner that is not permissible under the laws of evidence, by taking certain figures that were given to him by somebody else and depreciating them in his own way, and he has had no experience in the operation or handling (III, 776) of machinery or equipment and he purposes to be a real estate man largely and primarily; that he is incompetent to judge values of any of the items such as floors, repairs to the building, windows, elevators, terrazzo floors, and especially machinery and fixtures, and that, by his own statements on the stand, he has been shown incapable of judging.

The Court: Overruled. Now, insert the answer.

A. Yes."

• • •

The witness then gave his compilation in the form of government Exhibit 24 (III, 777). It was objected to upon the same grounds as his testimony, and the objection was overruled and the exhibit received by the court (III, 776). The exhibit showed total annual rental, including excessive use, $65,663.00, plus additional "restoration costs of $16,680," and showed a total of $253,066.80: "Rental" was arrived at by figuring a rate of interest, not on the cost to the Kimball Laundry Co. or its value in 1942, but on the witness's idea of values separately found by his own depreciation formula.

After the testimony of the witness Sholes, the government rested its case (III, 801).

The court ruled out the rebuttal testimony of all the petitioner's witnesses (except one), and in so doing committed the following errors:

XXIX.

Rebuttal testimony of Dahlquist re cost of $34,309.42 to repair petitioner's machinery and equipment.

The witness, Peter W. Dahlquist for the Kimball Laundry Co., qualified as an exceptionally reliable witness, having been in the laundry machinery and equipment business for many years as a buyer, seller, and in-

staller of it, and had purchased and sold and installed similar items throughout the United States (III, 803). The government witnesses, Newcom and LaTurner, were permitted, over counsel's objection (III, 556; supra 87-90) to testify that it would cost $11,668.73 to place the machinery and equipment in a good state of repair. The court finally ruled as follows in recognition of Dahlquist's rebuttal testimony (III, 811):

> "Q. In the event that repairs and replacements were put on these machines, either in the amount as I have (III, 812) related to you by the government's witnesses, or in the amount that you found, would it place that machinery and equipment in the condition that it was in 1942? In other words, would the restoration, by virtue of the repairs and maintenance and labor, place that machinery in the same condition that it was in November of 1942, after three and one-half years, of approximately three years and a little over of usage?
>
> Mr. Murphy: To which petitioner objects as incompetent and immaterial; not proper rebuttal testimony, being a part of respondent's case in chief; and for the further reason that there is no claim those repairs would put this machinery in the same condition it was in 1942, the government's figures adding over and above that, at least, normal depreciation to a considerable extent; and for the further reason that the witness is not shown qualified to answer and there is no proper foundation laid, it appearing from the testimony of this witness that his business does not involve appraisals of repairs, but his supervising of installation, only, of new and used machinery, and that the only appraisal he ever made was in connection with a fire loss; and for the further reason that there is no foundation laid in that there is no showing that this witness at any time made any appraisal of machinery other than Amer-

ican Laundry Machinery items. I thought that first part of the objection was ruled on Friday.

The Court: Not exactly. The Kimball Laundry offered evidence on the proposition of damage, the value between the time of taking and the present time. The government proceeded along this line and offered evidence of what would be required to repair these machines. Now, this is the first opportunity that the Kimball Laundry Company has had to go into that question. This man is going to testify that it cost more or less than the government's witnesses. That is proper rebuttal testimony, but he will not be permitted to go any farther than to show what his figures are. That is rebuttal testimony. He lays a foundation in that he is in (III, 813) the service or employ of this American Laundry Machinery Company and that he, in that capacity, made an appraisal of the items of repair that would be necessary, and arrived at his figure. He is competent to do that. He is selling these repairs. But, to undertake to appraise the building or matters with which he is not familiar, that will not be permitted. Have I made myself clear? We will follow that line and you will not go any farther." (Supra 64-67.)

(III, 815) "Q. From your experience in observing laundry machinery and equipment, such as you related Friday, has it been your experience, would you say, that when you saw this laundry machinery equipment in November of 1945, that it showed any evidence of abnormal use, or was it such as you would find in any laundry that had been running and operating for a period of three years?

Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained.

Q. Would the expenditure of the amount of money you said, $34,309.42, restore that machinery

and equipment in a condition of repair so that it would be virtually restored to a new condition, substantially so?

Mr. Murphy: Objected to as not proper rebuttal testimony.

The Court: Sustained."

The testimony of the government's witnesses was for $20,471.27 (III, 809-10), while Dahlquist's was for $34,309.42 for the same material and parts. The difference was in labor costs. Mr. Dahlquist estimated the labor cost at $2.85 per hour, whether skilled or unskilled. On redirect examination the question was asked (III, 822):

"Q. Does all the work which you saw that was necessary to be done down there require skilled work, or is it any of it common labor?

A. I will say it is. At that time you had to pay the prevailing rate whether he was carrying a bolt around, or working as an electrician or a first-class machinist.

Mr. Murphy: Just a moment. Move to strike the answer as not responsive.

The Court: Sustained."

The witness Dahlquist's Exhibits 48, 49, and 50 are itemized (III, 822-3) as to cost of labor, etc. (found in original record Vol. III, 1089-91), showing that the explanation of the cost of labor made up this difference; and the court ruled from the jury's consideration the witness Dahlquist's rebuttal of the LaTurner testimony (III, 552) wherein the hourly rate was stated to be 85¢ for helpers. That amount was used by the witness Crowder, as shown by government Exhibits 10, 11, and 12 (III, 557-67). It was error by the financial difference between

$34,399.42 (III, 823) and $20,471.27 (III, 645). By the foregoing ruling the court denied the petitioner the right to rebut.

XXX.

The Kimball Laundry Co.'s rebuttal evidence on cost of painting and decorating, was denied.

The court erred in rejecting the testimony of G. A. Steinheimer (III, 829-31). The witness qualified as a large volumned painting and decorating contractor (III, 823). The procedure by the petitioner was first approved by the court (III, 812). Later this procedure was erroneously denied. Exhibit 52 (III, 829), a written bid by the witness Steinheimer stated that it would cost $17,281 to do the painting and decorating work which the government witness Rorick (III, 478-90) said could be done for $5,997 (III, 824). The government witnesses said this work of rehabilitating the building could be done for $8,389 (III, 827), and this item appears on government Exhibit 17 (III, 636-40).

(III, 828) "Q. I will ask you to state whether or not you made a bid to the Kimball Laundry Company, as such, based upon the same figures that you had given to Mr. Rorick?

A. We gave them a copy of the letter to Mr. Rorick.

Q. You made the same to both?

A. Yes, it is just a carbon copy.

(III, 829) Mr. Hotz: Now, we ask that Exhibit No. 52, with that explanation—

The Court: That does not change the rule. You know that. That is not rebuttal testimony. You have

been over that field. You have to put an end to this case sometime."

Exhibit 52 of the petitioner was erroneously rejected, and it had been fully explained in writing by the witness Steinheimer. His clearly understood bid for the painting and decorating work was $17,281 (III, 829), instead of $8,389 (III, 827) which had been alleged by the government witnesses to be sufficient.

XXXI.

Denial of the testimony of Peter Kiewit for petitioner to rebut the government's "cost of restoration."

The petitioner's witness, Peter Kiewit, was denied the right to testify in rebuttal (III, 831-5). He was a highly qualified witness in the construction business for the government and others during many years. He was thoroughly familiar with the cost of construction and of material and labor cost at the time of trial in Omaha (III, 831). He had made personal inspections of the Kimball Laundry Co. building, with the idea in mind of stating in writing the cost to place the building in a proper state of repair. He had gone through the building three different times during the previous week before his testimony.

(III, 832) "Q. Did you furnish the Kimball Laundry Company with an estimate of what it would cost to place the building in a good state of repair as you observed the necessary things to be done?

A. We prepared a proposal based upon putting the building in first-class condition, yes, sir.

Q. And you have just been able to complete that very recently, isn't that true?

Mr. Murphy: Objected to as incompetent and immaterial, the witness having testified when he did it.

The Court: Sustained."

Kimball Laundry Exhibit 53 was offered in evidence (III, 833-5) showing the itemized cost so proposed by Mr. Kiewit to be $53,970.

(III, 833) "Mr. Hotz: We offer that in evidence, if Your Honor please.

Mr. Murphy: To which the Petitioner objects as incompetent and immaterial and not proper rebuttal testimony, the Respondents in their case in chief having presented evidence in detail on both the value of the building and cost of repairs to that building.

The Court: I think there was a little difference on the basis of your measurement of the loss or damage down there between the Government and the laundry. They proceeded on the theory of the value at the time of taking and you come then with special experts to prove what it would cost to restore the building and put it in a first-class condition, and on that theory this is the first opportunity they have had. They had rested their case before you disclosed your method and I am going to permit it."

The court then committed error by sustaining the objection and changing his ruling because of the fact that Harry A. Jacobberger and A. L. Jacobberger had given testimony of the difference in value of the building between the time of taking and the time of trial, estimating the difference to be $35,000. The court stated (III, 833):

"The Court: You went into the matter with Mr. A. L. Jacobberger definitely and distinctly. Objection will be sustained."

Harry A. Jacobberger had testified when on the witness stand that he had some bids in preparation for destroyed property and that he would try to get them in during the week. The witness's bid was one of them. The court erred in making the following ruling (III, 834):

(III, 834) "Mr. Hotz: I would like the Court Reporter to read the portion of Mr. Jacobberger's testimony there about getting his bids in.

The Court: I read it.

Mr. Hotz: He said he would try to get them in before the end of the week if he could.

(III, 835) The Court: I read it and I know what it is.

Mr. Hotz: In reference to Exhibit 53, it is likewise offered as having been identified by the witness Mr. Peter Kiewit, president of Peter Kiewit Sons, and offer it as a part of the examination of Mr. Harry Jacobberger, in support of his testimony in reference to the structural repairs on the building, and ask the court for permission to do that in furtherance of justice in this case.

The Court: You were cautioned just before you rested your case that that was the time to introduce your evidence. Overruled."

The following had taken place during the testimony of Harry A. Jacobberger:

(II, 404) "Q. Have you had occasion to make inquiry into the condition of the building at the present time, speaking of the building as such now, the structural condition, after the army has been in there during this period of time, so that you could testify what you believe it will cost to make the necessary structural repairs to that building to bring it back as near as possible in the condition it was in No-

vember, 1942, and I wish you would tell us about that and give us the items you have in mind. You will find nothing on that exhibit you have there. That has to do with something else. That is the machinery and equipment.'

A. During the past thirty days I have spent considerable time in and outside of the building to find out what it would require to restore that building in as good condition as it was the day of taking and I have been trying to get estimates ever since for the work that has to be done to the building, and I find estimates are constantly going up. The longer we seem to wait on this thing, the higher the rates come on these estimates. For instance, I received an estimate this morning on the painting of that building. It hasn't been painted since 1941. The estimate was $17,000."

(II, 406) "Q. How about steel window frames?

A. In some cases they will have to be replaced. In most instances all they have to do is scrape the rust off and then have to put some rustproof paint on them.

Q. Have you an estimate as to the value of that?

A. No.

Q. What is your estimate as to what it would cost?

A. I wouldn't want to say. I haven't any idea.

Q. Do you suppose you could make up your mind and get it for us before we conclude this week?

A. I have been trying for a week to get that."

XXXII.

The court's error in rejecting the rebuttal testimony re J. J. Hanighen Co. on boiler expense.

The court erred in ruling out the actual estimate of the J. J. Hanighen boiler company as not proper rebuttal (III, 846,7). Petitioner's Exhibit 55 showed Mr. Hanighen's estimate of the cost to be $21,678. This was erroneously ruled out from consideration of the jury. The court stated (III, 849):

> "* * * Mr. Jacobberger has told us frankly what in his judgment he thought the damage was. You were given every latitude to support his testimony. You rested. Now, in rebuttal, this is not rebuttal testimony. * * *"

This was error, because it was offered in rebuttal to the testimony of the government witness Crowder that the boilers could be repaired and put in good working condition for $5,817.50 (III, 639). Mr. A. L. Jacobberger testified that this power equipment was worth $62,928.08 in November, 1942, and $35,260.53 (II, 271), in 1946, that one boiler of 225 h. p. was damaged beyond use and destroyed, to the damage of $8,921.25 to the Kimball Laundry Co. (II, 271, 310-11; Ex. 23, II, 273).

The court erred in refusing the Hanighen Exhibit 55 (III, 847) in rebuttal, because it showed the real expense to install to be $21,678 instead of the sum stated by government witness Crowder, and concerning which there was no testimony by either Jacobberger.

> (III, 847) "A. This Exhibit 55, Kimball Laundry Exhibit, is a bid on a boiler which was in the Kimball Laundry Exhibit 2? In other words, it is a bid to replace the boiler that we contend had been damaged beyond use.
>
> Mr. Hotz: We offer in evidence the bid of Hanighen, the letter, Exhibit 55.

Mr. Murphy: Objected to as not proper rebuttal testimony, and being a part of their case in chief.

The Court: Sustained.

Mr. Hotz: We offer to prove by Exhibit 55, and to prove by this witness, to verify the items in Defendant's Exhibit 23.

Mr. Murphy: Same objection and for the further reason I know of no procedure for making an offer of proof on an exhibit.

The Court: I don't either, but I am learning something lately."

This Exhibit 55 was proper rebuttal. It was Error for the court to reject it (III, 847-8).

o

LAW POINT NO. I

A.

The federal constitutional provision is a restriction upon the legislative and executive branches of our government in reference to taking property for public use without payment of just compensation. It is solely the duty of the judicial branch to determine just compensation in all cases that come before it.

Boyd v. U. S. (1886), 116 U. S. 616, 635, 6 S. Ct. 524.

Davis v. George B. Newton Coal Co. (1925), 267 U. S. 292, 43 S. Ct. 305.

U. S. v. New River Collieries Co. (1923), 262 U. S. 341, 43 S. Ct. 565-7.

B.

When all the physical assets of a going business, such as a laundry and dry cleaning corporation, are condemned for the purpose of governmental operation of the same business for the exclusive use of the army, thus putting the condemnee corporation out of business entirely, the fair, reasonable market value to the corporation as a going concern on the date of the taking forms the proper legal basis upon which to measure just compensation. The established laundry trade routes, when so proven to have a readily ascertainable value on the market, form a part of the composite fair market value on the date of the taking.

Monongahela Nav. Co. v. U. S. (1893), 148 U. S. 312, 13 S. Ct. 622.

U. S. v. Powelson (1943), 319 U. S. 266, 63 S. Ct. 1047.

U. S. v. Brooklyn Union Gas Co., et al (2 Cir., 1948), 168 F. 2d 391.

C.

These routes are distinguished from the noncompensable items of good will, loss of profit, and loss of further business. If it is proven that these routes would be destroyed as a natural consequence known to the condemnor to be a direct and proximate result of the taking of the physical plant owned by the condemnee, their value forms a part of the total value of the compensable property taken.

Brooks-Scanlon Corp. v. U. S. (1924), 265 U. S. 106, 44 S. Ct. 471.

National Brick Co. v. U. S. (Dist. Co., 1942), 131 F. 2d 30.

Olson v. U. S. (1934), 292 U. S. 246, 54 S. Ct. 708.

Spanenburger v. U. S., 308 U. S. 256, 60 S. Ct. 225.

D.

The refusal of the trial court to receive competent evidence offered to prove such values is reversible error.

Argument

1. The above point (IX, B, C, D) was presented by the petitioner to the courts below as the law applicable to this case. The Court of Appeals held:[1]

> "We cannot accept this proposition as the law. The government took exactly what it purported to take, namely, the temporary use and occupancy of the company's laundry."

2. The position taken by the petitioner in the trial court embodied all parts of the foregoing legal point. Evidence was offered to sustain the position, but was rejected. Whether the government took a temporary use or an absolute fee title, it was necessary, as viewed by petitioner, to arrive at the fair, reasonable market value of the composite laundry and dry cleaning establishment as a going concern as a basis for the measure of damages, on the date of taking. Such basis is the standard adopted by the judicial branch of the government as seen from the cases listed above under "B" and "C". Therefore, the rule adopted by the trial court rejecting this evidence of value was error.[2]

3. "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their

1. Vol. IV, 8.

2. Error XIII, supra, 64-7; Error III, supra, 25; Table, supra, 7; Error VII, supra, 47-52; Error V, supra, 25; Instruction—Error II, supra, 34-82; Error X, supra, 28; Exception to Instruction—Error 14, supra, 38; Error IV, supra, 44-5; Error III, supra, 41.

efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"[3]

4. The petition in condemnation as filed herein was by the trial court erroneously interpreted to mean that by the terms and conditions for the taking therein set forth by the executive branch of government curtailed and limited the application of just compensation as judicially defined in the cited cases. The ascertainment of just compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.[4]

5. It was an abuse of discretion in the case at bar when the trial court gave too much credence to the right of the executive branch of the government by confining the evidence for compensation as if the problem were based upon an ordinary landlord and tenant arrangement. While the petition in condemnation stated that the government desired the business carried on at the designated location,[5] the executive branch defined its plan of acquisition to a temporary use of the real estate, with all personal property located thereon and used in connection therewith. Through those words the government as the condemnor succeeded at the trial in keeping out all evidence of composite value for all purposes, because as held by the trial court such

3. *U. S. v. Powelson* (1943), 319 U. S. 266, 63 S. Ct. 1047; *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312, 13 S. Ct. 622.

4. *Davis v. George B. Newton Coal Co.* (1925), 267 U. S. 292, 45 S. Ct. 305, citing *U. S. v. New River Collieries Co.*, 262 U. S. 341-3-4, 43 S. Ct. 596-7; *Boyd v. U. S.* (1886), 116 U. S. 616, 635, 6 S. Ct. 524.

5. Vol. I, 2, 7; II, 17.

value would include trade routes established, and that such value would be "going concern" value on November 21, 1942. This narrow view of the courts below has been assigned as error as above set forth and fully indexed in the footnotes throughout.[5]

6. There can be no doubt that the court did rule out all evidence of the composite value of this property as $987,624.32,[6] and instructed the jury accordingly.[7] Nor can there be any doubt that the witness Judd's testimony on the value of the trade routes as $340,516.85 was ruled out and error assigned.[8] Likewise the competent evidence that it would cost $412,450.00 at the time of trial to re-establish those routes was rejected.[9] This rejection of trade route value injured the petitioner's claims before the jury in the amount of $294,791.01[10] by the denial of the additional compensation. The sum rejected is over and above the total judgment[11] of $297,776.03 finally awarded under the instructions of the trial court.[12]

7. The Court of Appeals cited to sustain its position, the Powelson case,[13] that going values and trade routes were immaterial in this "temporary use case." The Powelson case holds by analogy that the value of the trade routes, for example, was neither the frustration of an enterprise nor the destruction of future business as was in-

5. Supra, 34-108; 23-34. This Law Point I covers all assigned errors on rejection of valuation.
6. Supra, 7-11.
7. Error I a to k, supra, 34-38; 39-41; 41-45.
8. Supra, 8-10; Error XV, supra, 71-2; Error VI, supra, 26.
9. Supra, 8-10.
10. Supra, 12.
11. Vol. I, 101.
12. Vol. I, 159-162; requested, 162-165; exceptions, 165-167.
13. *U. S. ex rel. Tyler v. Powelson* (1943), 319 U. S. 293, 63 S. Ct. 1047.

volved in the Powelson case. Powelson claimed damages for a frustrated promotional plan to develop the water power sites which he had collected and which were taken by the Authority before developed as going concerns. The value of these business opportunities was denied him; they were too speculative, and properly so. Pay would have been granted by the judicial branch of our government had they been already established and if destroyed in the taking. "If these numerous tracts had already been united by respondent through the power of eminent domain into a power project, distinct problems would be posed as *Sears v. City of Akron* (246 U. S. 242; 38 S. Ct. 245) indicates. Then the United States would be acquiring a business, not simply frustrating a promotional scheme. * * * We hold only that profits attributable to the enterprise which respondent hoped to launch are inadmissible as evidence as the value of the lands which were taken."[13]

8. The trade routes in the case at bar were established and had a definite value which inhered in and were a part of the property taken. The plant was a counterpart of the routes and vice versa. They cannot be logically separated, one from the other, for any purpose of valuation for just compensation. The routes were valueless without the laundry machinery and equipment with which to service the trade route customers. The routes were already established. They had been built up over the previous years at a large expense to produce an annual income of $400,000. The rejection of the evidence to so prove was error as above shown. These errors are herein discussed as indicated in the footnotes above.[14]

14. Supra, 6, 8, 9; 24-108; 23-34.

9. The Monongahela case was reversed by this court because the just compensation awarded did not include the value of the income from the franchise to collect tolls. "So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, —the franchise to take tolls."[13]

10. There should be no discrimination against a private right to operate business routes and the private right to take tolls in the matter of just compensation. No fair distinction can be made under the Constitution. No estoppel was pleaded or proven in the Monongahela case; however, as a defense to the Navigation company's claim of compensation for the loss of the tolls, the government set up that the Navigation company had no right in the first place to build its lock and dam across a navigable stream with no other consent than the State of Pennsylvania. The Navigation company answered that the government had encouraged the construction of the lock and dam in question and had appropriated and given to the Navigation company $25,000 to aid in its construction when built some years previously. The court held that under such condition the government could not successfully claim that the Monongahela Company had no right to place its lock and dam on the navigable stream. To that extent, estoppel may be inferred. Such estoppel fails to lessen the importance of the point in issue, i. e., that the income from the tolls proved productiveness, and productiveness increased the value of the whole property. In the case at bar the court rejected all the Hillmer exhibits which were the complete audit of the income and expendi-

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13. *Monongahela Nav. Co. v. U. S.* (1893), 148 U. S. 312, 13 S. Ct. 622.

its tracks safe from the ice, wind, saturation, silt, etc., which were the natural results of the dam erected by the government, the court permitted such recovery even though the recovery was resisted strongly on the basis that such damages were consequential rather than real or proximate. The court carefully distinguished the cases cited by the government[19] to substantiate its position that the appellee's damages were consequential. It divided the government's cases into two categories: first, those arising under the Tucker Act, wherein by reason of lack of jurisdiction and lack of actual taking, no consideration of just compensation could be given; and those which arose prior to a clearly apparent liberalization of the nature of what constitutes a taking of property for public use. The court pointed out that to the word "taking" there has now been added by judicial interpretation the words "or damaged." The Nebraska Constitution contains the word "damaged," as copied in the appendix. This modern trend where the word "damage" does not appear, as in the Federal Constitution, clearly comports with fairness and justice and without which just compensation guaranteed by the Constitution fails of accomplishment.[20]

2. Another specific instance which reflects the more liberal attitude of the court toward consequential damages, is found in the case wherein the government takes a temporary use of a warehouse, thereby requiring the tenant leaseholder to move and acquire additional warehouse space elsewhere. In accomplishing this, it was necessary for the tenant to incur a bonus expense of $12,000, plus

19. *Sanguinetti v. U. S.*, 264 U. S. 146, 44 S. Ct. 264; *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127; *Christmann v. U. S.*, 74 F. 2d 112.
20. *U. S. v. C. B. & Q. R. R. Co.*, 82 F. 2d 131, 141.

an "above normal moving cost" of $15,000. The government argued that these were consequential damages from the condemnation, for which there should be no recovery against the United States. However, the Court of Appeals, reversing the trial court, stated that although these items could not be considered independently, they should nevertheless be considered in arriving at the market value of the space under all conditions and circumstances of the taking.[21]

3. In a case cited the court was confronted with the question of determining whether the loss in the valuation of the property retained was a consequential damage. It was proven therein that an actual business loss was suffered by the condemnee. As a basis for the determination of this property loss, the value of the property before and the value after the taking was held proper. The court found that such loss was a compensable damage as distinguished from a noncompensable consequential loss. The court reasoned that it was common sense that a buyer would pay for property what it was worth to him and would purchase at a figure on which he could reasonably foresee making a profit on his investment. Viewing the facts in this practical light, the court found the damages sustained by the condemnee were actual and proximate and not merely business losses or losses of profit which of their very nature are consequential damages.[22] This reasoning and holding is applicable herein.

4. The government has in the past attempted to avoid the payment of damages for the acquisition of various rights of way, such as the right of egress and ingress.

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21. *U. S. v. Katz Drug Co.* (8 Cir., 7/31/45), 150 F. 2d 687.
22. *U. S. v. 257.65½ Acres of Land, etc.* (1947), 72 F. Supp. 903.

tures, both gross and net, of the company in various periods. This evidence showed gross income of $6,728,454.64 over the period from the incorporation of the company in 1924, with an annual income of $460,000 gross at the time of the taking. It was error for the court to have ruled out the Hillmer audits.[16] A buyer would most assuredly call for these very audits to determine fair market value.

11. When the Brooklyn Navy Yards were extended, the government took in some twenty-five acres of land upon which an electric power company operated to furnish these utilities to the population under its franchise arrangements with the municipality. The court, in addition to awarding proper compensation for the loss of equipment and the value of certain land, reversed the case and ordered an appraisal made of the value to the utilities company of the productivity of the electricity sold in the territory taken.[17]

12. In each of the four cases cited above under Point I-A to D, damages were awarded to the owners of the property for losses as the direct result or consequence of the taking, even though in each case the government failed to condemn or take that part, parcel, or element, the value of which was destroyed to the owner by the taking.[18]

13. The question presented to this court is whether or not in the case at bar the principles established in all

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16. Supra 5, 6, 7; Error assigned re rejection—Error V, supra 25; Error VII-VIIa, 47-52.

17. *U. S. v. Brooklyn Union Gas Co., et al.* (2 Cir., 1948), 168 F. 2d 391.

18. *Natl. Brick Co. v. U. S.* (Dist. C., 1942), 131 F. 2d 30; *Olson v. U. S.*, 292 U. S. 246, 54 S. Ct. 708; *Sponenbarger v. U. S.* (8 Cir., 1939), 308 U. S. 256, 60 S. Ct. 225; *Brooks-Scanlon Corp. v. U. S.* (1924), 265 U. S. 106, 44 S. Ct. 471.

the foregoing cases cited under Points Nos. I, A-B-C may be completely altered by a petition signed by the executive branch limiting its taking of the property in question to a temporary use. Petitioner admits the obvious: that the property was abandoned to the petitioner immediately after the trial in its dilapidated condition and with its trade routes completely destroyed. That property had a value to the petitioner even in such condition. Herein following petitioner will point out through adjudicated cases the proper basis for determining the damages for the term occupied, based upon cases of property taken for temporary use that have no fixed rental value, such as square foot, or acre, or other customary unit of measurement for rental purposes.

LAW POINT NO. II.

Ordinarily, "consequential damages" are those which do not arise as an immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while "proximate damages" are those which accrue directly and in natural sequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause.

U. S. v. C. B. & Q. R. R. Co., 82 F. 2d 131, 141. Cert. denied, 298 U. S. 689, 56 S. Ct. 957.

U. S. Katz Drug Co. (8 Cir., 1945), 150 F. 2d 687.

U. S. v. 257.854 Acres of Land, etc. (1947), 72 F. Supp. 903.

U. S. v. Welch (1910), 217 U. S. 333, 30 S. Ct. 527.

Argument

1. In a case wherein a railroad sought to recover damages for the amount it was forced to expend in making

which were lost to the condemnee by the taking, on the grounds that the damage resulting from the loss of such right was consequential and should be distinguished from direct or proximate damage. The courts, however, refused this erroneous premise advanced by the government, and held that such rights of way were, in effect, easements and that the acquisition of the same entitled the condemnee to just compensation for them. The courts went further in that they held that the granting of just compensation therefor could not be denied because the easement was destroyed and as a result there was no taking. The court held that since the destruction of the easement was for a public purpose, it constituted a taking and the condemnee was entitled to just compensation for his loss of the easement.[23] Such reasoning and holding is applicable herein.

5. The trial court, when it excluded all the petitioner's evidence relative to the cost of establishing the trade routes, did so on the theory that the loss of the routes was consequential damages.[24] The court, in rejecting this evidence, erred because by so doing, it failed to make the proper distinction between proximate damages, which are those which accrue directly and as a natural consequence, and as a specific (hurtful) result from the act done, without the intervention of an independent cause, and consequential damages which are those which do not arise as an immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause.[25] There was nothing intervening that caused the losses to

23. *U. S. v. Welch* (1919), 217 U. S. 333, 30 S. Ct. 527.
24. Error I, supra, 34-8; Except. Error II, supra, 38-40; Inst. refused, Error III, supra, 41-4.
25. *U. S. v. C. B. & Q. R. R. Co.*, 82 F. 2nd 131, 141.

the petitioner. The government either took or destroyed the values in the taking of the business as operated by the petitioner.

6. Instead of excluding, by the instructions, all the petitioner's evidence as to destroyed values, by stating they were consequential damages, should not the court have received such evidence and instructed the jury to assist them in properly arriving at a sum which would be just compensation for the interest destroyed and which obviously were the values measured by the usual market price in the trade?[26] Such evidence was offered but denied because consequential. There is a clear distinction between evidence which affects the market value of the condemnee's property and that of consequential damages. The trial court failed to recognize the distinction.[27]

7. There is no doubt that the trade routes and this composite property, with its divers departments equipped to service all the needs of its route customers, enhanced the value of the petitioner's property. Should not the court have recognized these values and instructed the jury to consider them instead of denouncing all values destroyed as consequential, and required the jury by instruction to confine its deliberations to a small rate of interest on the investment in land, building, and machinery, each separately appraised, and exclude all else? The above-cited cases are petitioner's authority for predicating error upon the trial court's conception of consequential damages?[28]

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26. Witness Hillmer, Error VII, supra, 47-53; Error IX, 58; Error X, 60; Error XI, 60-2; Error XII, 62; Error XIII, 62-6; Judd on Route Values, Error XV, 71; costs to re-establish, Error XVI, 72.

27. *U. S. v. Katz Drug Co.* (8 Cir., 1945), 150 F. 2d 687.

28. *U. S. v. 257.65½ Acres of Land, etc.* (1947), 72 F. Supp. 903.

8. In the case at bar the court instructed the jury that "Under the Constitution and under the law, you cannot make any allowance whatever for property that is not taken."[29] The court also said, "I permitted evidence in this case as descriptive of the property, only, of the fact that it was a going concern. That is not the measure, whether it is a going concern or not, but is descriptive of the condition and will give you a picture, an idea of the property, the use of which was taken. That was one reason. The fact that the Kimball Laundry Company undertook to place some element of value on the property, since it is a going concern, is not permissible and is not competent. It is not the thing that we are appraising here or that we are holding the inquest on. The reason for this is that this is not a damage suit. It is not an action such as would be brought between individuals based on a tort where they would be entitled to recover anything they lost, good will, going concern, and damages and that sort of thing. That is not the kind of an action we have here. The only reason is that the law does not provide for these things."[30] No good will was ever offered in evidence at any time as an element of value.[31]

9. The court also said, "Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army."[32] The court said, "Having once arrived at the value, you then can begin figuring and use as a yardstick an interest rate. That is a very convenient yardstick for courts to use and we use it when-

29. Vol. I, 154.
30. Vol. I, 155.
31. Error VI, supra 46; supra, 1015; Vol. II, 200.
32. Vol. I, 159.

ever we can because it is in general use. Frequently it is used in damage cases. It is fair for it to be used here."[32] Petitioner contends such interests on capitalized values is an improper measure of damages herein.

10. The exceptions were taken to the court's instructions, and requested instructions were tendered and refused. The composite instructions of the court, while containing some proper statements of the law, served only to confuse the jury and left them no other course than to accept the valuations of the witnesses, Weber and Sholes, with an interest rate figured separately on the value placed by these witnesses upon land, building, and machinery. Error has been predicated upon this procedure, these instructions, and the exclusion of the fair, reasonable use value that was offered by the witnesses as owners.[33]

LAW POINT NO. III.

In condemnation proceedings fair market value defines a basic figure. When the damages to be awarded are for an arbitrary interim period of use and occupancy, between the date of taking and the date of abandonment to the condemnee, the fair market value when returned subtracted from the fair market value when taken will result in just compensation.

11,000 Acres in Texas v. U. S. (1945), 152 F. 2d 566.

Olson v. U. S., 292 U. S. 246, 54 S. Ct. 704.

U. S. v. Land in Marin County, Calif. (1946), 65 F. Supp. 454.

U. S. v. Indian Creek Marble Co. (Tenn., 1941), 40 F. Supp. 811.

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33. Vol. I, 156; supra, Errors 34-108 and 23-34.

U. S. v. Lynah, 188 U. S. 445, 23 S. Ct. 349.

U. S. v. Bowman (Ore., 1943), 56 F Supp. 109.

U. S. v. Land in Charleston (S. C., 1943), 54 F. Supp. 478.

U. S. v. Hotel, Oakland, Calif. (Calif., 1943), 53 F. Supp. 767.

Second War Powers Act, March 27, 1942, "Acquisition and Disposition of Property," amending Title 50, Sec. 171, by Sec. 632, 636, 636(a), Title 50 U. S. C. Found in Appendix.

"Return of Property to Original Owners," 50. U. S. C. Sec. 722. Found in appendix.

Argument

1. The foregoing cases are damages for temporary use. They involve the measure of damages to be adopted. In most instances the difference in value before and after taking or value when returned, has governed. In some of the cases the United States District Courts have denounced the Land Department attorneys for the government for attempting to impose a temporary use on fee-owned property, as in the case at bar, when such attorneys well knew it would open the door to injustice arising from an attempt to fix "rent" under circumstances where rent never existed.[34] Some of the courts have refused to hold that right of temporary use on fee-owned property was authorized under the statutes above set forth. Others hold that the "temporary use thereof" which the government might take meant the condemnee's temporary use of the property.[35] In most of the cases above cited the point of the right to condemn a temporary use was not contest-

34. *U. S. v. Bowman* (Ore., 1943), 56 F. Supp. 109, 115.
35. *U. S. v. Hotel* (Calif., 1943), 53 F. Supp. 767.

ed. Only the measure of damages seemed important. The United States Supreme Court has held that the wording of the petition does not govern what was taken, but the result achieved must determine. As above shown under Point I, the judicial branch of government must insure just compensation by its action, regardless of what is taken, for how long, or for how much and irrespective of the wording of the petitions.[36]

2. In the case at bar petitioner submits that the taking was absolute and the result was exactly as if the fee were taken. It was a going and established servicing business that the army needed.[37] The army wished to operate it for pay from soldiers for the same services condemnee had long been giving to its route customers.[38]

3. However, the government did declare the laundry as surplus and abandoned it to the condemnee after 3.6 years of hard, and, no doubt, very profitable, use.[39] The government had two alternatives when the property was declared surplus. The first was to take the fee by ex parte court order, accomplished merely by filing a paper in the Clerk's office so declaring; then offer the property for sale and credit the army with the funds received against the award that would be paid petitioner for the full market value of the composite property at the time of taking. The other alternative was to turn back the property to the condemnee in its then condition, and have the values determined in the instant case based upon values at time of taking and values at the time of return.

36. *Davis v. Newton Coal Co.*, 267 U. S. 292, 45 S. Ct. 305.
37. Supra, 4-10.
38. Supra, 5. Vol. II, 447-8.
39. Vol. I, 97.

Either plan would have insured just compensation as defined by the courts. Instead, the government insisted upon a procedure that could not insure just compensation except by happenstance. This brief is replete with record references to the obvious confusion in trying to determine "rent" for taking over a going business with the likewise obvious impracticability of seeking the proper measure of damages under the circumstance presented.[40] No better proof of the confusion is found than in the repeated utterances of the trial court herein during the trial and in its instructions.[41] The points of error were saved by petitioner on its offers of proof on before and after value, the instructions requested by it for the same purpose, the exceptions made, the errors assigned and argued below, and now presented herein as grounds for reversal with directions to the court below to adopt the before and after value standard suggested by petitioner. The question is herein earnestly propounded. Its answer will aid in the administration of justice whenever the government takes over a going business for its own use. Any nationalization of industry must meet proper requirements of just compensation. The 5th amendment must not be defeated by shifting to "rent" for indefinite periods without compensation for the full value lost as a direct result of the taking of the business.

3. The duty imposed upon the district judges to define and instruct the measure of damages for so-called temporary use, is difficult of fulfillment, as seen in the opinions

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40. Supra, 23-34, 31-108.

41. Vol. I, 150-162; Error I, supra, 34; II, III, supra, 41-4; VI, supra, 47-53; IX, supra, 58; XI, supra, 60; XII, supra, 62; XIII, supra, 64-7; XIV, supra, 67-71; XV, supra, 71; XVI, supra, 72; XVII, supra, 74; XVIII, supra, 75-80; XIX, supra, 81; XX, 83; XXI, 84.

from the foregoing cases. The exception is where there has been a lease condemned for a "temporary use thereof," which lease defines the so-called "rent." Had the Kimball Laundry Company been "rented" in the course of business, it no doubt would sell the trade routes, machinery, and equipment outright, and rent the ground, building, and mechanical equipment to the purchaser. But no such thing ever existed of "renting" an income producing business. The business might be destroyed during any rent period.

4. The Jacobbergers, as owners of the capital stock of the petitioner, tried to meet the court's plan of fixing "rental value" for the period. Their testimony was temporarily admitted. The figures given them were between $570,000 and $600,000 for the 3.6 year term. From this sum the trade routes must be built back at an estimated expense of over $412,000 to be spent over three years; the loss on machinery was fixed at over $153,000; over $53,000 for structural repairs to building and $17,000 for painting and $35,000 must be paid for boiler replacement from the sum, and, in addition, taxes, insurance, and expense of storage. Since the sums given by the owners seemed fair, when explained by them they should have been submitted to the jury to deliberate upon. But these figures were not submitted either for the full amount or as broken down into what would be done with the money.[42]

5. However, should this High Court conclude that interest on fixed capital investment as awarded for the use at $70,000 per year, was proper, then most certainly in the face of actualities the excessive damages to restore

42. Supra, 15-16.

the property may now be known with exactness. The trade routes were destroyed; they had a value on November 21, 1942. If they still had value on March 23, 1946, when the property was returned, such fact may now likewise be measured with exactness. The testimony of Kiewit, Steinheimer, and Hanighen offered in rebuttal,[43] but refused, demonstrates the immense difference in the estimated costs to restore, between them and the inexperienced government witness Crowder. Now these matters may be judged *in praesenti* rather than *in futuro*.

The Fifth Amendment requires expression by the judicial branch in terms of exactness when possible. It was reversible error by the trial court to conduct the proceedings as it did.[44] It is timely now for the corrections to be made by reversal, with directions for the measurement of damages as herein suggested under this Law Point No. III.

LAW POINT NO. IV.

When payments for just compensation are delayed until trial and award by the jury, additional compensation is granted as a matter of statutory law. Upon the total amount ultimately found due in the jury's award, the law provides that six per cent on the amount, from the date of taking, less payments made, shall be included in the award. It constitutes error for the court to deny such additional compensation.

40 U. S. C., Sec. 258(a). Found in appendix.

U. S. v. Klamath & Moadoc Indians (1938), 304 U. S. 119, 123, 58 S. Ct. 799, 801, and cases therein cited.

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43. Supra, 11-13.
44. Supra, 34-108.

U. S. v. 6.87 Acres of Land (1945), 147 F. 2d 351.

U. S. v. Rogers (1921), 255 U. S. 163, 41 S. Ct. 281.

U. S. v. Seaboard Airline (1923), 261 U. S. 299, 43 S. Ct. 354.

Phelps v. U. S. (1927), 274 U. S. 341, 47 S. Ct. 611.

U. S. v. Northern Pacific R.R. Co. (Wash. 1943), 51 F. Supp. 749.

Argument

1. Interest is a nontaxable item against the United States, as a rule. The Fifth Amendment was not designed to remedy that situation in condemnation proceedings. But congress desired to add to the measure of damage in condemnation proceedings because of the delay in determining what just compensation should be finally paid. The law provides that money may be paid into court from time to time in a condemnation proceedings without regard to the ultimate award. When the ultimate award is found, then Congress provided that "said judgment shall include as part of the just compensation awarded interest at the rate of six per cent per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."[45]

2. The trial court sustained the government's request that interest be denied as provided in the forego-

45. 40 U. S. C., Sec. 258(a) (appendix this brief).

ing section of the statute, and based its request upon the fact that the "taking" should date only to the beginning of each government fiscal year during the 3.6 years instead of to Nov. 21, 1942, the date of taking possession. The petitioner was awarded $252,000 for the period of 3.6 years. From time to time money was paid into court under the statute without regard to whether it was or was not full compensation. On those amounts so paid, no additional compensation is had. Consequently, as viewed by the petitioner, the final award should have dated back to the date of the taking in accordance with the statute, and interest should have been awarded accordingly as additional compensation as provided by the statute.

3. This error was assigned[46] and presented to the court below. The trial court was sustained by the Court of Appeals.[47]

4. The method adopted by the trial court of figuring the interest is fully set forth in the judgment on the verdict,[48] and the petitioner's position thereon is fully set forth in its motion in arrest of judgment[49] and in the motion for new trial.[50] It need not be repeated.

5. It will be seen that no interest was allowed on the item of $45,776.03 found as pay for the extraordinary damages done to the building and equipment. Of course, the entire judgment less the payments into court drew interest from the date of the verdict on March 20, 1946, until paid. But that is not the point before this Court.

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46. Supra, Error XXII, 85-6; XXIII, 86.
47. Vol. IV, 13.
48. Vol. I, 103.
49. Vol. I, 97.
50. Vol. I, 107.

Is it legally possible for the executive branch of the government to defeat a statute in reference to condemnation by cutting the term of possession into bits by an ex parte filing of a new declaration of taking as if there was to be a hearing before a jury to determine the award upon each of such filings? Obviously that was not the intention of the government. The army took the property on November 21, 1942, and kept it and maintained it until it was declared surplus and abandoned on March 23, 1946. During that period of time there was no determination of the amount due the petitioner from the army for just compensation. The payments were haphazardly made into court as shown on the table presented in this brief[51] for credit on the ultimate award.

6. The petitioner's conception of the law is that the ultimate determination of the amount to be paid dates back to the date of possession as the starting point for the 6%. The statute provides that additional compensation shall be paid for that delay in the determination and payment of the amount due. The statute provides that payments into court draw no interest. "Taking" means to give up the possession before payment. It is that "taking" that the statute contemplates as the date to fix the beginning of the time to figure six per cent additional damages on the ultimate award.

7. As far as the judgment for excessive damage to the structure and the machinery is concerned, that too must be governed by the statute and date back to the day of taking. The item calls for no different treatment than the so-called rental. Inadvertently and haphazardly

51: Supra, 21.

the term "rental" has crept into this case and into some others in the lower courts. The entire award is actually for *damage* that is ultimately determined by the jury upon which the additional compensation applies. The statute fixes the date to start figuring the 6%, not the court.

8. There was filed, also, before the trial court an additional item of damage in reference to the costs and expenses that the petitioner incurred in complying with the mandate of the court to come forward and have its property appraised before the Board of Appraisers. In complying with the court's request, the petitioner expended the sum of $3,153.97.[52] These expenses have been itemized and explained fully. The trial court denied them, and the denial was affirmed.

9. It seems, as a matter of justice, that these expenditures, necessarily made for the use of the government as well as the condemnee in an effort to arrive at just compensation, should be awarded the condemnee as additional damages occasioned in the proceedings, even though perhaps not technically allowable as costs under the statute.

10. Another item of interest which was denied the petitioner was in reference to interest on $34,875.50 from November 21, 1942, to July 8, 1943, when the item was paid by the government to the petitioner. The item was for soap, chemicals, and similar items that the government needed in the operation of this laundry as a going concern. It took these supplies on November 21, 1942, and the petitioner received its pay on July 8, 1943. This interest aggregated $1,395.02. The application was set forth

52. Vol. I, 40, 45.

first in the petition in error,[53] then in the answer,[54] both of which were stricken,[55] and submitted to the court below which disapproved the item by stating, "we find no evidence in the record to support the assertion."[56] The court's attention was directed, as herein, to the presentation of the matter to the trial court, and the motion to strike it from the pleadings and the court's sustaining it. Consequently, there could be no evidence on the subject. It was error for the court to have stricken it, as well as the item in connection with the expenditures before the Board of Appraisers.

11. These matters of interest are of vital importance, especially in reference to the attempt of the government to avoid the additional statutory compensation by claiming that each government fiscal year constituted a new taking for that year instead of as above stated, the affixation of the six per cent from the date of the actual physical taking possession of the plant under the petition filed Nov. 21, 1942.[57]

12. The foregoing cases support petitioner's views.

LAW POINT NO. V.

Under the law announced in the Petty and General Motors Company cases, the petitioner's evidence herein of cost expended in establishing its trade routes, together with other evidence of their value, should have been admitted by the trial court because affecting market value of the interest taken by the government, as distinguished

53. Vol. I, 45.
54. Vol. I, 30.
55. Vol. I, 76; III, 863.
56. Vol. IV, 14.
57. Vol. I, 1, 5, 12.

from such noncompensable items as proof of value peculiar to the petitioner, the value of good will, the injury to the business of petitioner, or other consequential damages.

U. S. v. Petty Motor Co. (1946), 327 U. S. 372, 66 S. Ct. 596.

U. S. v. General Motors Corp. (1945), 323 U. S. 373, 65 S. Ct. 357.

Argument

1. The crux of the controversy between the petitioner and the government is whether the trade routes constitute such an integral and essential part of the business that the fair market value of the laundry taken by the government would remain undetermined unless evidence of costs to establish these routes and other evidence of their value were admitted.

2. The government, seeking to substantiate its position, prevailed upon the trial court to hold that the petitioner's loss of its routes was a consequential damage, and the court announced it relied upon the Petty and General Motors Company cases for such ruling.

3. When this High Court stated in the General Motors case at page 383 that "proof of value peculiar to the respondent, or the value of good will, or of injury to the business of the respondent. * * * in this case (the case of the taking of a temporary use and occupancy), as in the case of the condemnation of a fee, must be excluded from the reckoning," the court in the case at bar considered the statement as authority for classifying the loss of the trade routes as consequential damage. The trial court herein failed to recognize the clear-cut dis-

tinction made by the High Court in these cases between evidence of consequential damages and evidence which affects market value.

4. In the General Motors case the government also took the view that such items as labor, materials, transportation, storage, and costs necessary for the occupation of other leased premises were consequential and were of course noncompensable; this Court rejected the government's contention and held that the lower court should have received this evidence, on the grounds that these items properly affected market value, ruling that such items may be proved not as independent items of damage, but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease.

5. Either the trial court in the case at bar failed to recognize the distinction drawn by this Court between evidence of consequential damage and evidence affecting market value, or, having recognized the distinction, failed to apply it in the case at bar. In either event, these authorities which support petitioner's contention of the admissibility of its evidence of the market value of the property taken, were applied by the trial court to deprive petitioner of its substantial right to receive just compensation for the property taken. The record shows that the court on several occasions stated that its rulings were founded on the principle announced in the Petty and General Motors Company cases.[58]

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58. Vol. II, 231-2; Error XVI, Supra, 31; Error VIII, supra, 53-4.

6. The Petty Motor Company case supports the General Motors case with the exception that evidence of the cost of return to location would not be admitted as a factor for determining market value, since the lease of the condemnee expired before the expiration of the term taken by the government.

7. In drawing the distinction between consequential damages and incidents of valuation this Court recognized the reasonableness of including the items in question in the two motor company cases since they affected the market value of the interest taken. So the reasonableness of including evidence of the trade route valuation in the case at bar is apparently based upon the principles announced in said motor cases. There is no doubt that the first inquiry of a willing buyer of this laundry would be the extent and valuation of the trade routes which are the fundamental factors of valuation.

LAW POINT NO. VI.

The condemnee in condemnation proceedings is entitled to have the jury pass upon the evidence without having its effect or importance altered, as to either credibility or value, by the indulgence of the court in remarks to witnesses or comments upon them or their testimony, or by improper instruction, if such comments or instructions tend to either magnify or diminish them in the jury's estimation. If it appears from the whole record that there has been an abuse of the trial court's discretion, it is the duty of the reviewing court to reverse the case and direct a new trial.

National Brick Co. v. U. S. (Dist. Col., 1942), 131 F. 2d 30.

Cal-Bay Corp. v. U. S. (9 Cir., 1948), 169 F. 2d 15.

Virginia Railroad Co. v. Armentrout (4 Cir., 1948), 166 F. 2d 400.

Langdon v. Loup River (1944), Neb. 625, 13 N. W. 2d 168.

McClellan v. Hein (1898), 56 Neb. 600, 77 N. W. 120.

U. S. v. Breitling, 61 U. S. 252, 20 How. 252.

Fleming v. Husted (8 Cir., 1947), 164 F. 2d 65.

Argument

1. In the National Brick, Cal-Bay Corporation, Virginia Railroad, and Langdon cases, the trial court was reversed in each case because of improvident remarks made in the presence of the jury by the trial judge. In the Nebraska case the court used the language embodied in the law point above set forth. In the National Brick Co. case the court said, "We think sufficient harm has been done by the rejection of proper evidence of value, coupled with the judge's statement limiting the appraisal to the value as real estate, to leave the jury bewildered as to the proper elements to be taken into consideration in ascertaining the fair market value of the property." The other cases are of similar holding.

2. When the witness, A. L. Jacobberger, was asked whether or not at the time of trial the laundry was in shape to be operated, the court, sustaining the objection, remarked, "I can go down and operate one by myself, and I don't know anything about a laundry."[59] The evidence showed that the commanding officer of the army in charge, Major General Craig, had issued an order to close the laundry as dangerous to human life because of

[59] Vol. II, 297-8.

the unsafe condition of the boilers.[60] In the instructions to the jury the court destroyed the evidence of the owners of the laundry after they had attempted to comply with the court's order in giving their idea of the amount of money that they should receive for a period of 3.6 years for the use of their laundry.[61]

3. In the McClellan case above cited, the court held it was an abuse of discretion of the trial court to deny rebuttal testimony even though it properly belonged in the main case. To refuse rebuttal testimony of a material nature seems to petitioner to be an abuse of discretion, especially when that rebuttal testimony in the most part was, as a matter of fact, proper rebuttal. Hereinabove it was shown that the evidence of the witnesses, Kiewit, Steinheimer, and Hanighen, had they been permitted to testify, would have given to the jury for its deliberation, $133,421.42 as the estimate of costs to repair damage to building, painting, boilers, and the machinery and equipment, as excessive damages. This testimony would have offset the government witness Crowder in his hearsay testimony of $59,743.01 for the same work. This rejection of rebuttal testimony, petitioner claims, was an abuse of discretion on the part of the trial judge.[62]

4. By reading the statement of the case and the proceedings below,[63] the errors assigned for reversal,[64] and the points relied upon for reversal which give the evidence and the remarks of the court in ruling on the ob-

60. Supra, 11, note 17.
61. Vol. I, 156; supra, 15-16, footnotes 28-23.4.
62. Supra, 19-20-24; 11, footnotes 18, 19, 20.
63. Supra, 4.
64. Supra, 25, 23.

jections,[65] the general attitude of the trial court will be apparent. The court was evidently determined to disregard every witness except those of the government and to confine the evidence that went to the jury to a capitalization on the investment in land, investment in building, and investment in machinery, not as shown by the cost or value to the petitioner but as separately appraised by the government witnesses. This the petitioner believes an abuse of discretion.

5. In the Breitling case the law is announced that it may constitute reversible error "when an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court, and if there is no evidence which they have a right to consider, then the judge does not aid them in coming to a correct conclusion by his tendency to embarrass and mislead them."

6. Similar expression is found in the Fleming case.

7. The trial court in the case at bar instructed the jury on a number of matters that were not in evidence and which seem to petitioner to be highly prejudicial to its cause. The court stated, "You are not to consider the fact that the owners of this property have a sentimental value there, having spent a lifetime working to build up the institution, and they did not want to sell."[66] Again the court said, "You cannot take into consideration the fact that these brothers and their families did not want to sell their property or did not want to lease it."[67] Again,

65. Supra, Errors 34-108.
66. Vol. I, 154.
67. Vol. I, 154.

"With these considerations in mind, how are we going to find the fair rental value for the use of this property? There does not seem to be anyone qualified to help us reach that figure."[68] The court had before it the best of testimony, as to both the value at the time of taking and the value when returned, and also had before it the testimony of the Jacobbergers which the court received and then struck out in the instructions as to the use value. This seemed to be an abuse of discretion. The court also said that the jury should make their award "without any sentimental values, without any good will, or the fact that it was a going concern or the fact that they were put to a lot of consequential damages. That is what they refer to. Consequential damages are just their hard luck that they happened to be selected, the same as it would be the hard luck of your son if he were called into the army."[69]

8. No evidence was offered by the Jacobbergers of sentimental value, good will, or that they were put to a lot of consequential damages or a hardship or that they did not wish to sell.

9. The composite instructions of the court could only confuse the jury rather than enlighten it. In view of the foregoing authorities, it would seem that the action of the trial court in giving these instructions in the manner in which it did, constituted reversible error because it was a distinct abuse of the court's discretion.[70]

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68. Vol. I, 157.
69. Vol. I, 159.
70. Vol. I, 159-160.

CONCLUSION

1. Petitioner requests this court to reverse and remand the case, with such direction as will insure just compensation for the property taken or destroyed by the taking. Evidence of the fair market value of the Kimball Laundry as a going concern with all its trade routes as it existed on November 21, 1942, the date of taking, should be determined. From said sum so found should be deducted the fair market value of the whole property as it existed on March 23, 1946, when abandoned to petitioner after being declared surplus by the army. There should be added to that sum so found, six per cent from the date of taking until paid, less the sums paid into court by the government for the petitioner, in accordance with 40 U. S. C. 258(a).

2. The interest on the supplies item, and the expense chargeable to the appraisal, should be paid as additional damages in accordance with the request of the petitioner.

3. Should the court conclude that an award to petitioner should be made by the trial court adopting a plan other than above suggested, which would give adequate and just compensation for the elements of petitioner's assets, as they were on November 21, 1942, but destroyed, or damaged, or rendered incapable of return on March 23, 1946, as a result of the taking, then petitioner requests that such plan be expressed by this Court in its opinion of reversal with direction.

Dated November 22, 1948.

Respectfully submitted,

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APPENDIX

1

Chapter 11—Acquisition of and Expenditures on Land for National-Defense Purposes

(Title 50, U. S. C., Section 171, p. 121.) **Methods of acquiring title; condemnation, purchase, and donation; emergency provisions.** The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further*, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and

the lands may be occupied and used for military purposes, and the provision of section 175 of this title, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency. (July 2, 1917, c. 35, 40 Stat. 241; Apr. 11, 1918, c. 51, 40 Stat. 518.)"

(Sec. 171(a), Title 50 U. S. C., 1937 P. Pt., p. 55)

"Sec. 171a. **Same**; real property for war purposes.

"The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) (Title 40, Sec. 257, 258), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise in accordance with section 1(b) of the Act of July 2, 1940 (54 Stat. 712) (section 1171(b) of Appendix to this title). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of this title), notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the pur-

poses of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended (Title 33, Sec. 733; Title 34, Sec. 520; Title 40, Sec. 255; Title 50, Sec. 175). July 2, 1917, c. 35, Sec. 2, as added Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title II, Sec. 201, 56 Stat. 177."

Title II—Acquisition and Disposition of Property (Second War Powers Act, 1942); (Title 50 U. S. C. App., p. 255)

App. Sec. 632. **Real property for war purposes.**

"The Act of July 2, 1917 (40 Stat. 241) (Title 50, Sec. 171), entitled 'An Act to authorize condemnation proceedings of lands for military purposes,' as amended, is hereby amended by adding at the end thereof the following section:

"'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) (Title 40, Secs. 257, 258), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712) (Title 41, note preceding section 1). Upon or after the filing of the condemnation petition, immediate possession may be taken

and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended (Title 33, Sec. 733; Title 34, Sec. 520; Title 40, Sec. 255; Title 50, Sec. 175). Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title II, Sec. 201, 56 Stat. 177."

(Title 40-42 U. S. C., Sec. 257, p. 93 of Title 40)

"Sec. 257. **Condemnation of sites; jurisdiction.** In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be authorized to procure real estate for the erection of a public building or for other public uses, he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice. (Aug. 1, 1888, c. 728, Sec. 1, 25 Stat. 351; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

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(Title 40 U. S. C., p. 123, Sec. 258)

"Sec. 258. **Same; procedure.** The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding. (Aug. 1, 1888, c. 728, Sec. 2, 25 Stat. 357; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

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(40-42 U. S. C., Sec. 258(a) pp. 139-40)

Condemnation of realty for sites and other uses; lands, easements of rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of the payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. (Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421.)"

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Title IV—Time Limit and Short Title (First War Powers Act, 1941); (Title 50 U. S. C., Sec. 621, App., p. 252)

"Sec. 621. Titles I and II of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President may designate. Dec. 18, 1941, c. 593, Title IV, Sec. 401; 55 Stat. 841.

"Limitation on Act, see section 775 of this Appendix."

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(Title 50 U. S. C., App. p. 295)

"Sec. 775. **Effect on First and Second War Powers Acts.**

"Except as provided in section 8 of this Act (section 768 of this Appendix), nothing in this Act shall be effective to limit or affect any power or authority granted or conferred by the First War Powers Act, 1941 (sections 601-622 of this Appendix), or the Second War Powers Act, 1942 (sections 631-645a of this Appendix). June 5, 1942, c. 340, Sec. 15, 56 Stat. 317."

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(Title 50 U. S. C., App., p. 296)

"Sec. 776. **Termination of Act.**

"The provisions of this Act shall remain in force during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate. June 5, 1942, c. 340, Sec. 16, 56 Stat. 317."

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Act Oct. 16, 1941, C. 445, 55 Stat. 742; Public Law 274, 77th Congress; National Defense; President to Requisition Property; Title 50 U. S. C., App.

"Sec. 721. **Requisition of military materials for United States; compensation.**

"Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount

of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act (section 722 of this Appendix), but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24(20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41(20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act (section 722 of this Appendix), regardless of the amount in controversy in any such proceeding.

"Nothing contained in this Act shall be construed—

"(1) to authorize the requisitioning or require the registration of any firearms possessed by an individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

"(2) to impair or infringe in any manner the right of any individual to keep and bear arms, or

"(3) to authorize the requisitioning of any machinery or equipment which is in actual use in connection with any operating factory or business and

which is necessary to the operation of such factory or business.

"Sec. 2. Wherever the President determines that property acquired under this Act and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and prays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1943.

"Sec. 3. The President from time to time, but not less frequently than once every six months, shall transmit to the Congress a report of operations under this Act.

"Sec. 4. The President may issue such rules and regulations and require such information as may be necessary and proper to carry out the provisions of this Act, and he may exercise any power or authority conferred on him by this Act through such department, agency, board, or officer as he shall direct or appoint.

"Approved, October 16, 1941."

(U. S. Code Congressional Service entitled "Historical Background of Government's Power to Requisition Property and the Need for the Present Bill," cf. Congressional Comment, Acts of 77th Congress, page 799.)

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SECOND WAR POWERS ACT, 1942

Title VI—Power to Requisition

(Title 50 U. S. C., App., p. 263)

"Sec. 636. **Amendment of Section 721 of this Appendix.**

"The last paragraph of section 1 of the Act of October 16, 1941 (55 Stat. 742) (section 721 of this Appendix), entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States,' is amended by deleting subdivision (3) thereof, so that the paragraph will read as follows:

"'Nothing contained in this Act (section 721 et seq. of this Appendix) shall be construed—

"'(1) to authorize the requisitioning or require the registration of any firearms possessed by an individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

"'(2) to impair or infringe in any manner the right of any individual to keep and bear arms.' Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title VI, Sec. 601, 56 Stat. 181."

"Sec. 636a. **Same; further amendment.**

"The second sentence of the first paragraph of section 1 of the Act of October 16, 1941 (55 Stat. 742) (section 721 of this Appendix), entitled 'An Act to authorize the President of the United States to requisition property required for the defense of the United States,' is amended by striking out the words 'on the basis of the fair market value of the property at' and inserting in lieu thereof the words 'as of;' and at the end of such sentence, before the period, inserting the words, 'in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States,' so that such sentence will read as follows: 'The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken

over pursuant to this Act (section 721 et seq. of this Appendix) and the fair value of any property returned under section 2 of this Act (section 722 of this Appendix), but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States.' Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title VI, Sec. 602, 56 Stat. 181."

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13

AMENDMENT

Act Oct. 16, 1941, C. 445, 55 Stat. 742 * * * (59 Stat. 271); Title 50 U. S. C., App., P. Pt. 1946, p. 92

"Sec. 722. **Return of property to original owner.**

"Whenever the President determines that property acquired under this Act (sections 721-724 of this Appendix) and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and pays the fair value thereof, return such property to the owner; but, in any event, property so acquired and retained shall, if the owner desires the property and pays the fair value thereof, be returned to the owner not later than December 31, 1946. As amended June 30, 1945, c. 208, Sec. 2, 59 Stat. 271."

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AMENDMENT

Title 50 U. S. C., Sec. 721, App. P. Pt. 1947, pp. 89-90. (June 30, 1945, c. 208, Sec. 1, 59 Stat. 271) on the question of limitation of the United States District Court on the amount in controversy states:

" * * * Such courts shall also have power to determine in an appropriate proceeding any questions that may

arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act (section 722 of this appendix), regardless of the amount in controversy in any such proceeding."

15

FEDERAL CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Federal Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

16

Constitution of the State of Nebraska, Article I, Sec. 21; Vol. II, R. S. N. 1943.

"**Private Property Compensated for.** The property of no person shall be taken or damaged for public use without just compensation therefor."

17

Ch. 83, Art. 6, Vol. IV, p. 1710, R. S. Nebraska, 1943— "Eminent Domain by the State."

"Sec. 83-601—State; lands necessary for state use; right of eminent domain.

"Sec. 83-602—Plat; abstract; filing; certificate; appraisers; appointment; qualifications; notice; railroad land.

"Sec. 83-603—Appraisers; meeting; notice; report of assessment.

"Sec. 83-604—Warrants; deposit with clerk; certified copy of award; recording; right of possession.

"Sec. 83-605—Appeal from award of appraisers; procedure.

"Sec. 83-606—Nonresidents; notice of appeal by publication; how given.

"Sec. 83-607—Appraisers; compensation; return; payment.

"Sec. 83-605, Nebraska Statutes. **Appeal from award of appraisers; procedure.** Either party may, within thirty days after the filing of the award, appeal therefrom to the district court of the county where the lands lie. * * * The appeal shall be set for hearing at the next term of court, and shall be heard and determined in the same manner as appeals from awards in condemnations of lands for railroad rights-of-way.

Ch. 74, Art 3, Eminent Domain—Railroads, R. S. Nebraska, 1943.

"Sec. 74-313. **Right of way; condemnation; record on appeal.** The appellant shall, within the sixty days allowed for such appeal, procure and file in the office of the clerk of the district court a certified transcript of all the proceedings of such assessment, including also all

papers and files relating to or connected with the assessment appealed from, and the county judge shall upon demand make such certified transcript and deliver the same to the appellant."

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"Sec. 34-314, **Nebraska Statutes. Right of way; condemnation; appeal; procedure.**

" • • • The parties shall proceed in all respects in the trial of the cause in the same manner as though the action had been originally instituted in such appellate court." (The appellate courts are the district courts of Nebraska.)

21

Ch. 25, R. S. Nebraska, 1943, Vol. II, page 233.

NOTE: Secs. 25-801 to 25-845 of the Nebraska Statutes provide that in proceedings in the courts of Nebraska the causes of action and defenses interposed shall be in writing and formulate the issues upon which the parties may rely in the trial of the causes.